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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 695 - 696

BENTLY S. HANDWORK, RALPH C. BOOZER, AND PHILIP W. LOTZ, INDIVIDUALLY AND AS TRUSTEES, ETC.,
Petitioners,

vs.

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GEORGE R. JOSLYN, BANKRUPT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, by their attorneys, respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgments of that Court entered in the above entitled cause on December 12, 1949, and in which a petition for rehearing was denied on February 10, 1950, and respectfully represent to this Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The ultimate question here is whether a federal court, having jurisdiction of a plenary action by a bankruptcy trustee against fiduciaries of a trust on the sole ground of an alleged diversity of citizenship must apply a statute of Illinois which has been interpreted by the highest court of that state to bar such an action.

This action was brought in the United States District Court for the Northern District of Illinois, Eastern Division, by the respondent, Horace A. Young, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt, against the petitioners, Bently S. Handwork, Ralph C. Boozer and Philip W. Lotz, individually and as Trustees, etc., to recover the interest of George R. Joslyn in trusts created by his father and mother, hereinafter called the "Joslyn Family Trusts" (R. 2-6).

The complaint alleged that the interest of the bankrupt in the Joslyn Family Trusts had passed to the respondent as trustee in bankruptcy under Section 70(a)(5) of the Bankruptcy Act (11 U. S. C. 110(a)(5)[1]) and that therefore the bankruptcy trustee was entitled to recover the bankrupt's trust interests from these petitioners as trustees (R. 2-7).

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1. (a) The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * except insofar as it is to property which is held to be exempt, to all * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *.

Petitioners urged, by motion to dismiss, that there was no diversity of citizenship and that Section 49 of the Illinois Chancery Act (Sec. 49 of Ch. 22, Ill. Rev. Stats.) barred the respondent from any recovery (R. 10-11, 181-182). Although all of the parties to this suit are residents of Illinois, the basis of federal jurisdiction was an alleged diversity of citizenship resulting from the fact that the bankrupt (whose citizenship is taken by the plaintiff as bankruptcy trustee) had moved from Illinois to Michigan between the time of his original bankruptcy in 1936 and the reopening in 1946 (R. 11, 213, 217).

The bankrupt, who is primarily affected, was not made a party to this proceeding. Had he been made a party there could have been no diversity of citizenship.[2]

The District Court after holding that it had jurisdiction by virtue of diversity of citizenship, entered an order of dismissal which provided (R. 203):

> " 'That under the undisputed facts as disclosed by the pleadings, the interests of George R. Joslyn in the Joslyn Family Trusts and the income therefrom in the hands of and under the control of the Joslyn Trustees fall clearly within the protection of Section 49 of the Illinois Chancery Act (Sec. 49 of Ch:22 Ill. Rev. Stats. 1947) and may not be reached by creditors nor a bankruptcy trustee acting in their behalf and that this question of law is free from doubt, and
>
> " 'That said interests of said George R. Joslyn in said trust estates are not property within the meaning of Section 70 of the Bankruptcy Act.' "

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision that it had jurisdiction on the ground of diversity of citizenship, but reversed the decree of the District Court on the ground

2. Under Section 23(b) of the Bankruptcy Act (11 U. S. C. 46(b)) the bankruptcy trustee assumes the citizenship of the bankrupt and parties on both sides would have been deemed citizens of the same state.

that under its interpretation of the Illinois statutes and decisions the bankrupt beneficiary had the right to alienate his interest in the Joslyn Family Trusts and that therefore the interests of George R. Joslyn in those trusts could be recovered in a plenary suit against petitioners by virtue of Section 70(a)(5) of the Bankruptcy Act (11 U. S. C. 110(a)(5)) (R. 233-249). The Court of Appeals further held that a federal court in a diversity case is not bound by a state statute or court decisions as to what constitutes property in that state when a plenary suit is brought by a bankruptcy trustee (R. 247-248).

This was on the theory that a holding that would deny relief to the respondent would be in direct conflict with the bankruptcy provisions which Congress in the exercise of its paramount powers had enacted.

The Court of Appeals accordingly remanded the case to the District Court with directions to proceed in accordance with the conclusion reached by the Court of Appeals as set forth in its opinion. Thus, the judgment of the Court of Appeals was a final decision upon a question fundamental to the further conduct of this case. *Land* v. *Dollar,* 330 U. S. 731, 734; *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 685. Furthermore, the Court of Appeals repeated several times in its opinion that it was ruling upon "the merits" of this case (R. 237-238).

Section 49 of the Illinois Chancery Act[3] has been inter-

3. "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court

preted by the Illinois Supreme Court and by this Court to bar every type of action by creditors and by bankruptcy trustees against the interest of a debtor beneficiary or bankrupt beneficiary in trust property "when such trust has, in good faith, been created by" some third person. Such a trust is involved here.

The Joslyn Family Trusts were created in August 1935 by Marcellus L. Joslyn and his wife for the benefit of their four children (including George R. Joslyn, who subsequently in February 1936 became the bankrupt) and their grandchildren (R. 67-87).[4] This was more than three years after the accrual of a stockholders' double liability resulting from the closing of Chicago Bank of Commerce of which the bankrupt was a stockholder (R. 93) and which liability was re-asserted in 1946 in connection with a reopening of the bankruptcy case. George R. Joslyn, the bankrupt, had filed his bankruptcy petition and had received his discharge in 1936 (R. 3).

In reversing the District Court's holding that the interest of George R. Joslyn in the Joslyn Family Trusts was not property which could be recovered in a diversity action by the respondent as bankruptcy trustee, the Court of Appeals refused to follow the decision of the Illinois Supreme Court in *Hummel* v. *Cardwell*, 390 Ill. 526, cert. den. 327 U. S. 793, rhrng. den. 327 U. S. 819, (which the

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shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: • • •." (underlining added.) Sec. 49 of Ch. 22 Ill. Rev. Stats.

4. The respondent and the Court of Appeals refer to the bankrupt's interest in the Joslyn Family Trusts as "vested" equitable life estates. This description is misleading. The bankrupt had no interest in the trust corpus but had solely a right to receive the net income which the Joslyn Trustees were directed to "pay over" to him and the other beneficiaries (R. 69, 79).

District Court had followed) and which had held that a similar interest in a trust was not property which could be recovered in a plenary action by a bankruptcy trustee on behalf of creditors and that such an action was barred by Section 49 of the Illinois Chancery Act.

BASIS FOR JURISDICTION OF THIS COURT.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1).

THE QUESTIONS PRESENTED.

I.

Whether in a diversity action the federal court may refuse to follow local property law where the plaintiff sues as trustee in bankruptcy.

II.

a. Whether the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64, applies to a plenary action by a bankruptcy trustee against third parties where local property rights are involved.

b. Whether Section 70(a)(5) of the Bankruptcy Act relating to a bankruptcy trustee's title to property supersedes local rules of property where a bankruptcy trustee seeks to recover in a plenary action in a Federal District Court and where federal jurisdiction is grounded solely on diversity of citizenship.

III.

Whether a state statute which has the effect of closing the doors of the state courts in every form of state court

action by creditors or bankruptcy trustees proceeding against a debtor's interest in a trust nevertheless leaves open the doors of the federal court to such an action where federal jurisdiction is grounded solely upon diversity of citizenship.

IV.

Whether the Court of Appeals instead of deciding a question of Illinois property law contrary to the Illinois statute and decisions should not have remanded this case to the District Court with directions to the respondent to file an appropriate action in the state courts.

REASONS FOR ALLOWANCE OF WRIT.

I.

In this case brought in the federal court on the sole ground of an alleged diversity of citizenship the Court of Appeals decided a question of Illinois property law in direct conflict with the decision of *Hummel* v. *Cardwell,* 390 Ill. 526, in which this Court denied certiorari in 327 U. S. 793, and denied a rehearing in 327 U. S. 819, and also in conflict with the decision of this Court in *Spindle* v. *Shreve,* 111 U. S. 542 (involving the identical Illinois statute).

II.

In this diversity case, where the plaintiff brought a plenary action as trustee in bankruptcy, the Court of Appeals in holding that federal law was paramount to the Illinois property law, decided a federal question in conflict with the applicable decisions of this Court in *Erie* v. *Tompkins,* 304 U. S. 64; *Angel* v. *Bullington,* 330 U. S. 183, 191, and *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109.

III.

In deciding that creditors and a bankruptcy trustee may be barred from relief when a plenary suit is brought in the state courts but that a federal court in a diversity suit may grant relief which the state courts would have denied, the Court of Appeals decided a federal question in direct conflict with the decision of this Court in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535.

IV.

In refusing to follow the case of *Hummel* v. *Cardwell*, 390 Ill. 526, on the ground that the relevant portion of the decision constituted *dictum* or that the Illinois property law was not settled, the Court of Appeals should have remanded this case to the District Court with directions to provide appropriate submission to the state court of the question here involved. In failing to so remand this case, the Court of Appeals decided an important federal question in direct conflict with the policy established by this Court in *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, and *Mangus* v. *Miller*, 317 U. S. 178.

Respectfully submitted,

BENTLY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, etc,

By HOMER D. DINES,
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The District Court did not prepare or publish a formal opinion.[5] The opinion of the Court of Appeals has been published at 179 F. 2d 70 (adv. sh.) and appears in the transcript of the record at pages 233 to 249.

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5. Another Judge of the District Court rendered an opinion published at 85 F. Supp. 68, in the related case of *Young* v. *First Nat. Bank of Chicago,* involving the same plaintiff who is respondent here and the same interest in the Joslyn Family Trusts. The District Court there reached an opposite result to that of the Court of Appeals here. This Court is respectfully referred to that opinion.

JURISDICTION.

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, is set forth on pages 2 to 6 of the Petition for Writ of Certiorari, and for brevity is not here repeated.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in deciding in a diversity case a question of Illinois property law in direct conflict with the decision of the Illinois Supreme Court in *Hummel* v. *Cardwell,* 390 Ill. 526, cert. den. 327 U. S. 793, rhrng. den. 327 U. S. 819, and in direct conflict with the decision of this Court in *Spindle* v. *Shreve,* 111 U. S. 542 (involving the identical Illinois statute).

The Court of Appeals further erred in deciding in a diversity case where the plaintiff sues as trustee in bankruptcy on behalf of creditors that the court may refuse to be bound by the Illinois property law as embodied in the Illinois statutes and decisions.

The Court of Appeals further erred in deciding that creditors and a bankruptcy trustee suing on behalf of creditors may be barred from relief in the state courts,

but that the federal court in a diversity case may grant relief which the state courts would have denied.

The Court of Appeals further erred in failing to remand this cause to the District Court with directions to submit the questions of Illinois property law to the state courts for a determination instead of interpreting Illinois property law independently of and in conflict with the decisions of the Illinois Supreme Court.

ARGUMENT.

I.

By Interpreting Section 49 of the Illinois Chancery Act (Sec. 49 of Ch. 22, Ill. Rev. Stats.) in Direct Conflict With the Decision of Hummel v. Cardwell, 390 Ill. 526, Cert. Den. 327 U. S. 793, the Court of Appeals in a Diversity Case Decided a Question of Illinois Property Law Contrary to the Illinois Statutes and Decisions.

In holding that the respondent was entitled to recover against the petitioners, the Court of Appeals established a rule for the federal courts in a diversity case in direct conflict with the decision of the Illinois Supreme Court in *Hummel* v. *Cardwell*, 390 Ill. 526, in which this Court denied certiorari in 327 U. S. 793 and a rehearing in 327 U. S. 819. In the *Hummel* v. *Cardwell* case, it was held that a bankruptcy trustee could not recover trust funds in the hands of an active trustee because Section 49 of the Illinois Chancery Act constituted a rule of property and not of procedure only.

The facts in this case and in the *Hummel* v. *Cardwell* case are substantially identical. In both cases the trusts involved were created by someone other than the debtors.

In both cases a trustee in bankruptcy sought to recover in a plenary suit against the trustees holding the trust funds. In both cases Section 49 of the Illinois Chancery Act was set up as a defense and in both cases it was recognized that creditors could not recover such trust interests by any remedy available under Illinois law. The principal difference was this: In the *Hummel* v. *Cardwell* case it was held that a bankruptcy trustee could not recover such trust interests in the state courts. In this case the Court of Appeals held that in a diversity case the federal courts would allow a recovery.

As has been shown, Section 49 provides immunity against creditors' claims where the debtor's property is held in trust and "when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from some person other than the defendant himself" (Sec. 49 of Ch. 22, Ill. Rev. Stats.—set forth in footnote 3, *supra*, p. 4).

Both the Illinois Supreme Court and this Court have held that Section 49 constitutes "a rule of property and not of procedure only." *Potter* v. *Couch*, 141 U. S. 296, also *Hummel* v. *Cardwell*, 390 Ill. 526, cert. den. 327 U. S. 793, rhrng. den. 327 U. S. 819. In other words, the procedure or remedy adopted by a creditor or a bankruptcy trustee, as the representative of creditors, is immaterial. Such trust interests simply cannot be reached by or on behalf of creditors. This was the uniform holding of the Illinois courts and federal courts in diversity cases prior to the opinion of the Court of Appeals in this case.

In *Potter* v. *Couch*, 141 U. S. 296, and in *Binns* v. *LaForge*, 191 Ill. 598, it was held by the Supreme Court of the United States and by the Supreme Court of Illinois, respectively, that a creditor's bill would not lie against such trust interests in view of the statute. The same bar applies with respect to the remedies of garnishment, *Baum-*

garden v. *R. C. F.*, 131 F. (2d) 741 (C. C. A. 7), and attachment, *Dunham* v. *Kauffman*, 385 Ill. 79.

It is also specifically held, that in view of Section 49 of the Illinois Chancery Act, such trust interests may not be reached by an assignee or trustee in bankruptcy (the exact question involved here). *Spindle* v. *Shreve*, 111 U. S. 542, *Hummel* v. *Cardwell*, 390 Ill. 526, cert. den. 327 U. S. 793, rhrng. den. 327 U. S. 819.

In *Hummel* v. *Cardwell*, 390 Ill. 526, the Illinois Supreme Court answered every argument which the respondent has been able to advance. The Court in holding against the bankruptcy trustee there, said (p. 534):

> "If the protection of Section 49 of the Chancery Act makes the interest * * * in the trust immune from any suit or lien by a creditor, surely a trustee in bankruptcy representing a creditor can have no greater or superior right. In the matter of exemptions and the interpretations of property rights, the bankruptcy courts have always regarded decisions of the State courts as controlling. (*Erie* v. *Tompkins*, 304 U. S. 64.)"

When confronted with the argument that the trust interest should be taken despite its immunity from suits or liens in the state courts, the Illinois Supreme Court said (pp. 534-535):

> "The trustee in bankruptcy contends that the amendment to the Bankruptcy Act in 1938 shows that property, even though it may not be subject to seizure, may pass to the trustee if it is transferable. With the exception given to exempt property in section 70A of the act and the power to acquire property through a plenary suit limited to those of a judgment creditor in section 70C, we do not construe the act to give a trustee in bankruptcy in plenary suits greater remedies in a State suit than those afforded a judgment creditor. Any other rule would be contrary to the plain language of section 70C and permit a trustee

to take property which, under the laws of Illinois, could not be taken by any other plaintiff for the payment of a debt. In *Dunham* v. *Kauffman*, 385 Ill. 79, we held that the interest of a beneficiary in a trust could not be reached by attachment. In *Baumgarden* v. *Reconstruction Finance Corp.*, 131 Fed. 2d 741, the Circuit Court of Appeals held that a trust fund which came squarely under the exception in section 49 of the Chancery Act could not be reached by garnishment.

The Illinois Supreme Court concluded upon this point as follows (p. 535):

> "It is clear, from the holdings of this court and that of other jurisdictions, that section 49 of the Chancery Act creates a rule of property and does not relate solely to procedure. (*Potter* v. *Couch*, 141 U. S. 296.)" (Underlining added.)

The Court of Appeals sought to avoid the clear language of the *Hummel* case by referring to the cross-appeal of the trust beneficiary in that case (who had failed to raise the defense of Section 49 in previous litigation, and in consideration of a satisfaction of a large indebtedness, had agreed to not appeal from the decree rendered there). In connection with that other appeal, the Illinois Supreme Court stated that the beneficiary was "estopped from litigating those questions again". That is the holding which the Court of Appeals described as a "voluntary conveyance" (R. 245). But that part of the *Hummel* case could not be interpreted as authorizing a transfer or sale by a beneficiary of trust interests in a trust created for his benefit and any such attempted interpretation runs into direct conflict with the plain language of the *Hummel* case upon the precise point involved here, *i.e.*, that a bankruptcy trustee is not entitled under Illinois law to recover trust funds of a section 49 trust in the hands of trustees where the trust beneficiary has become a bankrupt.

Nor is there any basis in any of the other Illinois decisions for the Court of Appeals to decide that interests of a beneficiary in such a trust may be freely and voluntarily transferred by the life beneficiary so as to subject the same to seizure in a plenary suit brought by a bankruptcy trustee. On the contrary, it was flatly held in *Hopkinson* v. *Swaim*, 284 Ill. 11, that trust income could not be voluntarily transferred by the life beneficiary, even though the will contained no express language against alienation. The Court there added:

> "There could be no such exemption from liability for debt if the beneficiary could convey or assign the income, for if she could do so it could also be seized in execution or attachment or reached by a creditor's bill."

In *Spindle* v. *Shreve*, 111 U. S. 542, this Court in referring specifically to Section 49 held that an assignee in bankruptcy could recover no interest in a trust falling within the protection of the Illinois Statute. This Court stated (pp. 547-548):

> "The statute of Illinois does not apply merely, as is argued, to cases where a technical discovery is sought, but to all cases where the creditor, or his representative, is obliged, by the nature of the interest sought to be applied, to resort to a court of equity for relief, as he must do, in all cases where the legal title is in trustees, * * *.
>
> "It cannot be doubted, that it is competent for testators and grantors, by will or deed, to construct and establish trusts, both of real and personal property, and of the rents, issues, profits and produce of the same, by appropriate limitations and powers to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part, or *in invitum*, by his creditors. The limits, within which

such provisions may be made and administered, of course, must be found in the law of that jurisdiction which is the *situs* of the property, in case of real estate, and in cases of personalty, where the trust was created or is to be administered according to circumstances. * * *

"* * * applied to the circumstances of the present case, the question would be merely, whether, according to the law of Illinois, the terms of the trust, * * *, created an interest or estate in the beneficiary, which, * * *, could be taken at law or in equity for payment of his debts, and which, therefore, vested in his assignee in bankruptcy.

"* * *, by reason of the positive provisions of the statute of Illinois, to which we have referred, the appellant (assignee in bankruptcy) has shown no right to the relief for which, in his bill, he prayed" (Matter in parentheses and underlining added).

Although the sole basis for the decision in *Spindle* v. *Shreve,* 111 U. S. 542, was that Section 49 of the Illinois Chancery Act accorded immunity in a plenary suit by a bankruptcy trustee, the Court of Appeals appeared to be of the erroneous opinion that the Court in that case based its holding upon certain language in the trust instrument involved there which is commonly found in some so-called "spendthrift trusts".

It should be noted, however, that whether the trust in this case is of the type commonly referred to as a "spendthrift trust" or merely an active trust falling within the protection of Section 49, the ruling should have been the same. Referring to the Illinois statute, the author of the note in 119 A. L. R. 41 states:

"* * * the effect of the statute appears to be to make all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of the beneficiary."

In *Knight* v. *Gregory,* 389 Ill. 554, at page 561 it was stated that:

> "In view of section 49 of the Chancery Act, however, all active trusts, which otherwise qualify, come under the doctrine of *Steib* v. *Whitehead*" (A leading spendthrift trust case in Illinois).

In other words, the rule in Illinois is definitely and firmly established that the same immunity is accorded to trust interests falling within the provisions of Section 49 of the Illinois Chancery Act, as is granted to so-called spendthrift trusts.

The Court of Appeals was also of the erroneous opinion that the *Spindle* case was not binding upon it because it was decided under an earlier Bankruptcy Act which, it is stated, did not affect transferable property.

As appears clearly from the decision itself, the assignee in bankruptcy received a transfer of all of the property of the bankrupt "not exempt from execution". As it has never been contended that Section 49 is an exemption statute, this would not exclude property falling within the protection of its provisions if such property were administerable. Further refutation of the Court of Appeals' view is contained in *Durant* v. *Hospital Life Insurance Co.*, Federal Cases No. 4188, where in construing the Bankruptcy Act of 1869 it was stated "* * * the assignee under our bankrupt law takes at once whatever interest is assignable, * * *."

The attempted distinction by the Court of Appeals of the *Hummel* and *Spindle* cases is untenable on two further grounds. First: The Illinois cases referred to by the Court of Appeals do not hold that a beneficiary of a Section 49 trust may freely assign or sell his right to receive future income. Instead, those cases involve an application of the doctrine of estoppel where transfers have been made in violation of authority (R. 240). Second: Even if capable of transfer under certain circumstances, the Court of Appeals should have followed the state de-

cisions holding that trust interests under Section 49 do not constitute transferable or leviable property which a bankruptcy trustee may recover under the Illinois statute and decisions.

A very similar situation under the 1898 Bankruptcy Act (the same bankruptcy act involved here) was ruled upon by this Court in *Eaton* v. *Boston Trust Co.*, 240 U. S. 427, where it was held that even though a trust interest was assignable under certain circumstances under the Massachusetts law, such an interest did not pass to a trustee in bankruptcy, if it could not have been reached under the state decisions by creditors or a bankruptcy trustee. In that case, Justice Holmes speaking for this Court declared (pp. 428-429):

> "It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank* v. *Adams*, 133 Massachusetts 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings* v. *Marsh*, 153 Massachusetts 311. *Munroe* v. *Dewey*, 176 Massachusetts 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assignable, and that therefore it passed under Sec. 70a(5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt 'could by any means have transferred.' The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Massachusetts 484.
>
> • • • • •
>
> "The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn* v. *Dobson*, 198 Massachusetts 142, 146. *Lathrop* v. *Merrill*, 207 Massachusetts 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon

which it has been established by the Massachusetts cases, *Page* v. *Edmunds,* 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols* v. *Eaton,* 91 U. S. 716. *Shelton* v. *King,* 229 U. S. 90. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

The situation under the Illinois Statute (Section 49) is precisely the same as under the Massachusetts decisions, *i.e.,* the interest in the trusts may not be reached by creditors or a bankruptcy trustee who sues in their behalf.

Justice Holmes, in referring to a supposititious case, observed that where a beneficiary had the power to free the corpus as well as the income from the trust restrictions the argument would be very strong that the statute (that is, the Bankruptcy Act) intended the fund to pass. He also observed (p. 428) that "there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts."

The rule applied in deciding the issues in the *Eaton* v. *Boston Trust* case is the rule which should be applied here. Respondent in his brief may urge this Court to follow the *dictum* referred to by Justice Holmes in the supposititious case. We again call this Court's attention to the fact that George Joslyn could not by any act on his part free the corpus of either of the Joslyn Family Trusts from the terms of the trust instruments. Nor does George Joslyn exercise any powers of ownership over the trust estates. He is purely and simply a life beneficiary in the income from the Joslyn Family Trusts as was the beneficiary involved in *Eaton* v. *Boston Trust.*

If the opinion of the Court of Appeals is permitted to stand the effect will be to provide a new remedy not heretofore available under Illinois law which may be employed only in the unique cases where a bankruptcy trustee may invoke federal jurisdiction on the ground of diversity of citizenship in an action to subject trust interests.

If allowed to stand, we shall have two bodies of property law in Illinois, one applicable in actions decided by the State courts and another in diversity actions in the federal courts, as it is not to be anticipated that the Illinois Supreme Court will agree to have its holdings on Illinois property law overruled by the Court of Appeals for the Seventh Circuit, which is supposed to apply Illinois property law as embodied in the Illinois statutes and decisions.

If the Court of Appeals in this case is right and the Illinois Supreme Court in the *Hummel* v. *Cardwell* case is wrong, this Court should have allowed Hummel's petition for certiorari. (See *Hummel* v. *Cardwell,* Nos. 823-825, October Term, 1945, cert. den. 327 U. S. 793.) It was argued by the petitioner there that the Illinois Supreme Court had denied relief to which *Hummel* as trustee in bankruptcy was entitled by the Bankruptcy Act. It was further argued there that the Illinois Supreme Court had decided a federal question erroneously when it held that *Hummel* as bankruptcy trustee could not recover in the State courts, in view of Section 49 of the Illinois Chancery Act.

The denial by this Court of certiorari in *Hummel* v. *Cardwell,* 327 U. S. 793, appeared to put at rest the contention that a bankruptcy trustee was entitled to employ additional remedies and obtain relief not available to creditors in the State courts of Illinois.

But the Court of Appeals has granted to the bankruptcy trustee in this case (which would have been tried in the

state courts except for the alleged diversity) a new remedy and relief never granted heretofore to any creditor or bankruptcy trustee.

Hereafter, if garnishment, attachment and creditors' bills fail, the creditor need only file a petition in bankruptcy against the debtor, and the trust intended for the support of the debtor and his family may be seized by the bankruptcy trustee and sold.

If the Court of Appeal's decision is permitted to stand, it may well follow that the remedies, heretofore denied by the Illinois courts, will be available to all creditors as well as to bankruptcy trustees in the federal courts sitting in Illinois. For, if the income of beneficiaries under Section 49 trusts is freely transferable, then, as stated in *Hopkinson* v. *Swain,* 284 Ill. 11, 23, "it could also be seized in execution or attachment or reached by a creditor's bill".

Thus, unless certiorari is granted and the judgment in this case reversed, the ruling of the Court of Appeals will have dire effects upon the Illinois law of trusts and the property rights of settlors and beneficiaries alike.

II.

In This Diversity Case the Court of Appeals Was Bound by the Doctrine of Erie v. Tompkins, 304 U. S. 64, Notwithstanding the Fact That the Plaintiff Was a Trustee in Bankruptcy.

The sole ground for alleged federal jurisdiction in this case is diversity of citizenship. In the absence of an alleged diversity, this action could only have been brought in a state court (11 U. S. C. 46b) and in view of the decision in *Hummel* v. *Cardwell,* 390 Ill. 526, cert. den. 327 U. S. 793, rhrng. den. 327 U. S. 819, there can be no doubt that

in any such state court action the substantive Illinois law and policy would have precluded the respondent from any recovery against the petitioners.

The Court of Appeals was of the opinion that this was a different type of diversity case because the respondent asserted his right to the trust interests under Section 70(a)(5) of the Bankruptcy Act (11 U. S. C. 110(a)(5)),[6] (R. 247). It concluded that it was not bound by *Erie* v. *Tompkins,* 304 U. S. 64 (which established the rule that federal courts in diversity cases should apply the substantive law of the state).

Even prior to *Erie* v. *Tompkins,* 304 U. S. 64, the federal courts in diversity actions brought by trustees in bankruptcy generally followed the state decisions with respect to what constitutes property. This doctrine has been fortified since *Erie* v. *Tompkins,* and has been clarified in a number of later decisions.

In *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), after referring to *Erie* v. *Tompkins,* the court declared (p. 109) that the essence of that decision was to insure that "• • • in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

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6. Although claiming title under Section 70(a), the filing of a plenary action by the respondent also required the assertion of rights under Section 70(c) which prescribes the remedies of a bankruptcy trustee. Respecting the remedies where property sought to be recovered is, as here, *not* in the possession of the bankrupt, Section 70(c) provides: "The trustee shall be deemed vested as of the date of bankruptcy with all of the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists" (11 U. S. C. 110(c)). As appears from the discussion under Point I no remedy available to the respondent would entitle him to make a recovery here.

Angel v. *Bullington*, 330 U. S. 183 (1947), also made clear that state law and state policy would be enforced by the federal courts where jurisdiction was based solely upon diversity of citizenship. This Court there said at page 187:

> "For purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State'."

This Court added at pages 191-192:

> "The essence of diversity jurisdiction is that a federal court enforces State law and State policy. • • • North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

The Court of Appeals in declining to adhere to this rule based its action primarily on *Marine Harbor Properties Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78, a Chapter X proceeding, in which the federal bankruptcy court declined to interfere with a pending state court foreclosure proceeding although recognizing its superior right where a debtor has in good faith sought relief under the Federal Bankruptcy laws. That case is wholly irrelevant here.

The question here is whether the bankrupt's right to receive income from a section 49 trust estate is *property* (under Illinois law) which may be recovered by a bankruptcy trustee in a plenary action. The result should not be different merely because the action is brought in the federal court on the ground of a diversity of citizenship. It is stated in Collier on Bankruptcy, (14th Ed.) Vol. 4, page 1149, as follows:

> "Whether the bankrupt's interest as a *cestui que trust* was, at the time of the bankruptcy, assignable or transferable, or subject to attachment, seizure or judicial sale, are matters generally to be determined by the law of the state where the trust has its situs."

The respondent's action is not a proceeding brought under the bankruptcy act, but a plenary action brought in the federal court by the plaintiff, as bankruptcy trustee solely on the grounds of diversity of citizenship.

The question is not—shall the bankruptcy act or section 49 prevail?

Here, the sole question is whether, in a diversity case, a federal court will grant relief which could not be obtained in the state courts.

In declining to adhere to the doctrine of *Erie* v. *Tompkins*, the Court of Appeals also relied upon the case of *In re Landis*, 41 F. 2d 700, which was decided in 1932, or more than six years prior to *Erie* v. *Tompkins*. In the *Landis* case, the same Court of Appeals refused to be bound by the Illinois decisions as to whether a contingent remainder constituted property administerable in bankruptcy (R. 247-248). Yet in the face of that decision which held that contingent interests are transferable, the Illinois courts have continued to hold that such contingent interests are not transferable and may not be taken by a bankruptcy trustee. *Johnston* v. *Herrin*, 383 Ill. 598. Hence, it is not to be expected that the Illinois Supreme Court will agree with the independent and conflicting interpretation of Illinois property law made in this case by the same Court of Appeals. This is especially true in view of the unequivocal position taken by the Illinois Supreme Court in the *Hummel* case which, as has been shown, this Court declined to review on a petition for certiorari, 327 U. S. 793.

This Court has never held and should not now give its

acquiescence to the holding of the Court of Appeals that in a diversity action brought by a bankruptcy trustee involving local property law, the federal court may refuse to follow the substantive law of the State. If allowed to stand, the opinion of the Court of Appeals will breed conflict between the Federal and State Courts where there has been harmony heretofore.

III.

The Illinois Statute and Decisions Having Barred Creditors and Bankruptcy Trustees From Any Remedy, the Federal Courts Should Not Provide a Remedy Where Federal Jurisdiction Is Grounded Solely on a Diversity of Citizenship.

As we have pointed out (*supra,* pp. 12-13) under Illinois law creditors and bankruptcy trustees are barred from employing the remedies of attachment, creditor's bill, and garnishment in actions against trustees of an active trust created by some person other than the debtor. As interpreted by the Illinois decisions, Section 49 of the Illinois Chancery Act is equivalent to the statute found in *Woods* v. *Interstate Realty Co.,* 337 U. S. 535, which provided that corporations not qualified to do business within the State of Mississippi "shall not be permitted to bring or maintain any suit in any of the courts in this State." Similarly, creditors and bankruptcy trustees representing creditors are barred in the Illinois courts from bringing or maintaining any action to recover any interest in a trust where the trust interest falls within the protection of Section 49 of the Illinois Chancery Act.

The rule in *Woods* v. *Interstate Realty Co.,* 337 U. S. 535, is clearly applicable in providing (p. 538) "that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court."

IV.

The Court of Appeals Should Have Remanded This Case For Submission of the Questions of Illinois Property Law to the State Courts Where it Refused to Recognize the Finality of Hummel v. Cardwell.

If the Court of Appeals doubted the finality of *Hummel* v. *Cardwell,* it should have remanded this cause to the District Court with directions to have the question of Illinois property law submitted to the state courts for a determination. The Court of Appeals in its opinion endeavored to minimize the controlling effect of *Hummel* v. *Cardwell* by referring to the clear language of that case (in so far as the respondent's claim is concerned) as *dictum* (R. 245). It is clear that where questions of local law are involved, the expressions of the highest state court—even though *dictum*—should be followed by the federal courts. *Hawks* v. *Hamill,* 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610; *Yoder* v. *Nu-Enamel Corporation,* 117 F. 2d 488, 489 (C. C. A. 8), and 35 C. J. S. pp. 1259-1260.

Even assuming, for purposes of argument only, that the Court of Appeals was correct in characterizing the relevant part of the decision in *Hummel* v. *Cardwell* as *dictum,* still its independent interpretation of Illinois property law was in direct conflict with the doctrine and policy established by this Court in *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 481; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, and in *Mangus* v. *Miller,* 317 U. S. 178 (a farmer-debtor proceeding).

In each of those cases this Court held that where a matter of local property law was unsettled, the federal court should direct a submission of the state property questions to the state courts for decision. In each of those

cases this Court remanded the causes with directions for the filing of a proper state court proceeding.

There can be no question but that had the same issue of Illinois property law been presented to an Illinois state court, the result would have been exactly opposite to that reached by the Court of Appeals.

In this case, a question of Illinois property law is of primary importance, but it was contended by the respondent (and erroneously held by the Court of Appeals) that a question of federal bankruptcy law was paramount.

In *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, 171, it was similarly argued by the respondent there that a question of federal constitutional law required interpretation by the federal courts. But this Court, after granting certiorari, held that first there were important questions of Illinois law to be decided. The parties were, therefore, remitted to the state courts for litigation of the state questions involved in the case.

In this connection, if, as we have shown, it is the law of Illinois that the interest of the beneficiary in the Joslyn Family Trusts is not property that may be freely and voluntarily transferred by the beneficiary, then there is obviously no property here upon which the federal bankruptcy act may operate.

Furthermore, if, as we have further shown, it is the law of Illinois that neither a creditor nor a bankruptcy trustee has any remedy against such a trust interest in the state courts, then it also follows that in this diversity case the respondent has no remedy and the bankruptcy act does not become involved.

As appropriately stated in the *Chicago* v. *Fieldcrest* case (p. 173) (in referring to the federal constitutional question): "that issue may not survive the litigation in the state courts. If it does not, the litigation is at an end.

That again indicates the wisdom of allowing the local law issues first to be resolved by those who have the final say."

In order that there may not be two separate doctrines—one applicable in the Illinois courts and another applicable in the federal courts sitting in Illinois in diversity actions, (if this Court should decide that the question of Illinois property law here involved has not been settled), this Court should allow certiorari in order to remand this cause to the District Court with directions to have the questions of Illinois Property law submitted to the state court for a decision as was done in *Thompson* v. *Magnolia Co., Chicago* v. *Fieldcrest Dairies* and *Magnus* v. *Miller.* This would enable the Illinois court to clarify its holding in *Hummel* v. *Cardwell,* if such is necessary, or to itself reverse the ruling there made if that Court feels that its decision there was wrong.

Conclusion.

The effect of the opinion of the Court of Appeals was to overrule the decision of the Illinois Supreme Court in *Hummel* v. *Cardwell,* 390 Ill. 526, cert. den. 327 U. S. 793. Unless the doubt and confusion resulting from the Court of Appeal's opinion is resolved by this court by granting this petition and reversing the judgment of the Court of Appeals there will be two bodies of property law in Illinois affecting every Illinois trust except those created by the beneficiary himself. It is to be anticipated that the opinion of the Court of Appeals would be employed as a basis for overruling the long line of decisions by which creditors and bankruptcy trustees have been barred in every type of action against trust interests such as are here involved. In order that there may be uniformity in the state courts and in Federal courts in diversity actions,

this court should grant to the petitioners a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BENTLY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, individually and as Trustees, etc.,

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 695, 696

BENTLY S. HANDWORK, RALPH C. BOOZER, AND PHILIP W. LOTZ, INDIVIDUALLY AND AS TRUSTEES, ETC.,
Petitioners,

vs.

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GEORGE R. JOSLYN, BANKRUPT,
Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

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vs.

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GEORGE R. JOSLYN, BANKRUPT,
Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners, by their attorneys, present herewith their reply brief to the brief of Horace A. Young in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit heretofore filed herein, and state as follows:

I.

The Respondent Attempts to Prejudice This Court Against Petitioners.

The respondent, in seeking to divert this Court from the questions presented by the petition for certiorari, and for the obvious purpose of creating confusion and preju-

dice, makes irresponsible and unsupported charges of fraud (Res. Br. 2) founded upon matters expunged and stricken from the record by the District Court (R. 201). The charges are irrelevant in that this plenary suit was filed against petitioners who are trustees under trusts created by persons other than the bankrupt, seeking a recovery which could not be obtained under Illinois law. Since the Federal Court was bound to follow the Illinois decisions, there could be no basis here for a charge of fraud in failing to schedule that which was not property in the first instance. The charges of fraud would be just as inappropriate if made against the Judge of the District Court who decided that the respondent's action was barred by Section 49 of the Illinois Chancery Act and that the interests in the trust estates were therefore not property within the meaning of Section 70 of the Bankruptcy Act. These charges are irrelevant for the further reason that they are directed against the bankrupt who is not a party to this proceeding. Had respondent made the bankrupt a party his presence in this case would have destroyed the diversity jurisdiction upon which the respondent has relied in seeking to obtain a different ruling from that obtainable in the State Courts of Illinois.

II.

The Judgment of the Court of Appeals Respecting Diversity Jurisdiction Is Final and Appealable. The Judgment of the Court of Appeals Respecting Section 49 of the Illinois Chancery Act Decided a Question Fundamental to the Further Conduct of This Case and Is a Proper Subject for Review on a Petition for Certiorari.

The respondent argues that the judgments of the Court of Appeals are not final and that certiorari should be denied upon that ground (Res. Br. 3-5). It should be pointed out, however, that the judgment in No. 696 in this Court

affirming the District Court in so far as federal diversity jurisdiction is concerned is a final judgment (R. 251). As we have further shown, with respect to No. 695, the Court of Appeals in holding that Section 49 of the Illinois Chancery Act did not bar the respondent's action decided a question fundamental to the further conduct of this case. *Land* v. *Dollar,* 330 U. S. 731, 734; *Larson* v. *Domestic and Foreign Corp.,* 337 U. S. 682, 685. The Court of Appeals also stated that it was ruling upon "the merits" of this case (R. 237-238). If the present petition for certiorari had not been filed, the respondent would certainly have argued in the District Court upon the remandment of this case that the judgment in case No. 695 had been acquiesced in and had established the law of the case which the District Court was bound to follow. It is even now argued that the Court of Appeals' opinion is the "law of the case" and it is to be anticipated that the respondent will seek to employ this argument to overcome any other issues not presented in the motion to dismiss respondent's complaint (Res. Br. 4).

Indeed, in seeking to extend the judgment of the Court of Appeals, the respondent repeatedly refers to the Joslyn Family Trusts as "non-spendthrift trusts" (Res. Br. 5, 14, 18 and 19), although the District Court did not hold that these trusts were non-spendthrift.

III.

The Sole Ground of Federal Jurisdiction in This Case Is Diversity of Citizenship.

Respondent in his brief in this Court (for the first time in this proceeding) alleges a ground of federal jurisdiction other than "diversity of citizenship". In his brief (Res. Br. 7) it is alleged that the District Court "also had juris-

diction" under Section 70(e) (3) (11 U. S. C., Ch. 7, par. 110(e) (3)). This section refers solely to voidable transfers and is obviously inapplicable. That section has never heretofore been referred to in this case. In his complaint the respondent invoked federal jurisdiction with the following allegation (R. 2):

> "There is, therefore, diversity of citizenship between the parties to this action. (and)
>
> "2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is of a civil nature."

As we have shown, the respondent was entitled to no relief under Illinois law if this case were brought in the Illinois courts. Therefore, in this diversity case, the Federal Court should not grant relief.

IV.

Hummel v. Cardwell, 390 Ill. 526, Held That Trust Interests Such as Are Involved Here May Not be Recovered in a Plenary Suit by a Creditor or Bankruptcy Trustee. No Illinois or Federal Decisions Have Held Otherwise.

The respondent has misstated and misconstrued the case of *Hummel* v. *Cardwell* in his presentation of that case to this Court (Res. Br. 14-15). As is demonstrated from the quotation of that case included in our brief (Pet. Br. 13-14), the *Hummel* case clearly held that trust interests such as are here involved are not transferable and may not be recovered by a bankruptcy trustee in a plenary suit in the Illinois State Courts.

The principal difference between that case and this is that in the present case the respondent's action was filed in the Federal District Court on the ground of diversity of citizenship.

The respondent is clearly erroneous in his statement that the interest of the beneficiary here is transferable property under Illinois law. He referes to cases which he cited to the Court of Appeals and which that court purported to follow in its erroneous decision (Res. Br. 15). We shall refer to those decisions briefly:

The Merchants Loan and Trust Co. v. *Patterson,* 308 Ill. 519, involved title to real property where the grantors named themselves as beneficiaries under a deed in trust for years. The grantors were beneficiaries for years and also the remaindermen. Section 49 of the Illinois Chancery Act which was held by the District Court to bar the respondent's action here (R. 203) was not involved since the Illinois statute only protects trust interests created by some person other than the beneficiary (as in the present case).

In *Hiss* v. *Hiss,* 228 Ill. 414, the life beneficiary was also the remainderman and therefore was both the beneficial and legal owner. No reference was made there to Section 49 of the Illinois Chancery Act.

In *Binns* v. *LaForge,* 191 Ill. 598, the Illinois Supreme Court applied the doctrine of estoppel where a beneficiary *in possession* had secured credit in consideration of an assignment of a trust interest and then sought to renege.

Blair v. *Linn,* 274 Ill. App. 23, was not a contested proceeding since both sides of the controversy were interested in obtaining court approval of an abortive assignment in order to effect an income tax saving and the life tenant was held entitled to relinquish his interest in favor of his children who were the remaindermen.

In *Blair* v. *Commissioner,* 300 U. S. 5, this Court followed the *Blair* v. *Linn* decision as the expression of the highest court of this state upon the property questions there involved, although the Illinois Supreme Court undoubtedly would not have acquiesced in the Appellate Court's opinion

as pointed out in the Appellate Court dissent which cited *Hopkinson* v. *Swaim*, 284 Ill. 11.

As we pointed out in our petition for certiorari, the Illinois Supreme Court in that case held that where trust income could not be reached by creditors, it could *not* be voluntarily transferred by a life beneficiary (Pet. for Cert., p. 15).

The only question involved in *Brown* v. *Fletcher*, 235 U. S. 589, was whether an assignee of a portion of the corpus of a New York trust estate could maintain an action in the Federal Court in New York.

Thus, the respondent, while arguing that the interest of the beneficiary is transferable both under Illinois law and Federal law, cites no authority whatever for his erroneous contention. His reliance upon *Hummel* v. *Cardwell*, 390 Ill. 526, as authority for holding such a trust interest as is here involved to be transferable, is a most brazen attempt to mislead this Court, as it is obvious from a reading of the *Hummel* v. *Cardwell* case that that decision is in direct conflict with the result reached here by the Court of Appeals.

The numerous cases involving stock exchange seats, liquor licenses, insurance policies, Indian headrights, etc., referred to by respondent (Res. Br. 20-21) are not relevant to this controversy, as has already been shown in our brief to this Court (Pet. Br. 24). The distinction was also brought out in *In re Whitney*, 113 F. 2d 426 (C. C. A. 2), where the Court said at page 428:

> "The interest of the beneficiary of a trust who becomes a bankrupt is not treated as an ordinary chose in action and regarded as in the constructive possession of the bankruptcy court, but the trustee who holds the *res* on behalf of the bankrupt is classed as an adverse claimant. The interest of a *cestui* in a trust is not like his interest in a stock exchange seat

(*In re Hoey*, 2 Cir., 290 F. 116) or in a claim against the state (*In re Weston*, 2 Cir., 68 F. 2d 913, 98 A. L. R. 319), * * *."

V.

The Federal Court in a Diversity Action by a Bankruptcy Trustee Should Follow the Local Property Law of the State Where It Sits.

The respondent does not deny that State exemption statutes and property laws vary in the several States, but argues, in effect, that since the federal constitution authorizes uniform laws of bankruptcy, that these State statutes and rules of property should yield to such uniformity where a bankruptcy trustee sues on behalf of creditors (Res. Br. 22). That simply is not the law. *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 190; *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 172; *Eaton* v. *Boston Trust Co.*, 240 U. S. 427, 429.

Referring specifically to trust interests it is stated in Collier on Bankruptcy (14th Ed), Vol. 4, p. 1149:

> "Whether the bankrupt's interest as a *cestui que* trust was, at the time of bankruptcy, assignable or transferable, or subject to attachment, seizure or judicial sale, are matters generally to be determined by the law of the state where the trust has its situs." (Underlining added.)

The trust involved in *Medwedeff* v. *Fisher* (Md. 1941), 17 A. 2d 141, was held not to be a spendthrift trust under Maryland law and the interest of the bankrupt in the trust was held to be subject to bankruptcy administration. The same trust interests in Illinois or Missouri may not be recovered by a bankruptcy trustee. *Jones* v. *Harrison*, 7 F. 2d 461 (C. C. A. 8), cert. den. 270 U. S. 652.

The respondent does not deny that the ruling of the Court of Appeals here is directly contrary to the holding of the Illinois Supreme Court in *Hummel* v. *Cardwell*, 390 Ill. 526. Instead he refers to the relevant part of that

opinion as *dictum* and seeks to subject the Illinois statute (Section 49) and Illinois decisions to a federal law because in this diversity action the plaintiff was a bankruptcy trustee. There is no question here of a conflict between the federal bankruptcy act and the Illinois statutes and decisions. The only question is this: May a federal court in a diversity case refuse to apply a state statute which the state court has held to bar the plaintiff's action?

Respondent argues that our petition for certiorari would substitute 48 different rules of property (Res. Br. 22). It is true that the property recoverable by a bankruptcy trustee varies in each of the 48 states depending upon the states' exemption statutes and rules of property, for the federal congress has never authorized a uniform exemption law nor provided for the overruling of state rules of property.

But respondent by asserting a right in the federal court in a diversity case not available in the state courts would impose two separate property rules in each of the states or 96 rules of property in the 48 states. The separate rules in each of the states would depend solely upon the question of whether the plaintiff's action had been filed in the state court or in the federal court (on the ground of a diversity of citizenship).

No federal statutes or decisions warrant such a departure from *Erie* v. *Tompkins*.

Nor can it be argued that the Bankruptcy Act was intended to make uniform the property law of the 48 states. It was only intended that the federal courts in diversity cases should apply the existing property law of the states where they sit—as the District Court did in this case—but as the Court of Appeals refused to do.*

* The same Court of Appeals had held that state property law was binding upon it in a diversity case. See *De Korwin* v. *First National Bank of Chicago*, 179 F. 2d 347 (C. A. 7).

The respondent takes the position in his brief that the mere fact that the plaintiff brings this action as a bankruptcy trustee makes the entire subject of this litigation a federal question (Res. Br. 22-28). From this position he appears to arrive at the erroneous conclusion that this is not a diversity case after all.

But, as we have shown, the sole ground alleged by the plaintiff for federal jurisdiction is a diversity of citizenship. His right to maintain his action in the federal court *upon that ground* has been sustained. Federal jurisdiction upon any other ground has never been urged heretofore. Although the respondent is now endeavoring to change the entire theory of his case, he is bound by rules applicable in diversity cases, namely, that the federal courts in such cases will apply the substantive law of the states where they sit including the states' property law.

If this Court has any doubt as to whether the Illinois Supreme Court would hold the interests in the Joslyn Family Trusts to be subject to levy and sale or capable of transfer (while yet in the possession of the petitioners as trustees of the Joslyn Family Trusts) then it is submitted that there is a question of Illinois property law which should be decided by the Illinois Courts in an action for declaratory judgment or similar proceeding. This was the procedure recommended in *Mangus* v. *Miller,* 317 U. S, 178, where under the farmer-debtor provisions of the Bankruptcy Act, this Court questioned the property law of the State of Utah.

In view of the respondent's erroneous presentation of this case and his inaccurate interpretation of the applicable decisions, it follows that the conclusions reached in his brief are wrong.

Conclusion.

WHEREFORE, petitioners pray that this Court will grant a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in order to reverse the judgments entered therein.

BENTLY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, Etc.,

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BENTLEY S. HANDWORK, RALPH C. BOOMER, and PHILIP W. LOVE, Individually and as Trustees, etc.,

Petitioners,

vs.

HORACE A. YOUNG, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt,

Respondent.

BRIEF OF HORACE A. YOUNG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 695 and 696

BENTLEY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, etc.,
Petitioners,

vs.

HORACE A. YOUNG, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt,
Respondent.

BRIEF OF HORACE A. YOUNG IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Opinion Below.

The opinion of the Court of Appeals below is reported in 179 Fed. (2d) 70, and is set forth in full at pages 233-249 of the Transcript of Record.

STATEMENT OF MATTER INVOLVED.

The matters involved herein are so clearly and succinctly summarized in the opinion of the Court of Appeals that we respectfully direct this Court's attention thereto for a short statement thereof (Tr. 233-249).

This is a plenary suit arising out of a fraudulent voluntary bankruptcy. The bankruptcy case was reopened in 1946 because George R. Joslyn, Bankrupt, had filed fraudulent schedules in 1936, in which he (1) fraudulently failed to schedule his true assets, and (2) fraudulently failed to list his true creditors (Tr. 124-5, 135, 138-9, 140, 152, 154-5). (See *In re Joslyn's Estate,* 171 Fed. (2d) 159, at page 161.). In the effort to conceal his frauds, the bankrupt committed five deliberate perjuries (Tr. 138-9). This case is a separate plenary suit brought by the Bankruptcy Trustee to recover from third parties (trustees for the fraudulent bankrupt) certain of the assets fraudulently concealed by the bankrupt in the bankruptcy case, consisting of income from two vested equitable life estates under two trusts.

The order appealed from in the District Court in this plenary suit was an order dismissing plaintiff's complaint upon the sole ground (held by the Court of Appeals to be erroneous) that the vested equitable life estates of the fraudulent bankrupt, George R. Joslyn, "are not property within the meaning of Section 70 of the Bankruptcy Act," and therefore "may not be reached by creditors nor a bankruptcy trustee," because of Section 49 of the Illinois Chancery Act (Section 49 of Ch. 22, Ill. Rev. Stats.,

1947) (Tr. 203). This order of dismissal was reversed by the Court of Appeals, with directions to the District Court to proceed in accordance with its conclusion that the fraudulent bankrupt's vested equitable life estates are administrable property in bankruptcy because, under the law of Illinois, as well as under the decisions of the Federal Courts, they are transferable property, the "title" to which has "vested by operation of law" in respondent as Bankruptcy Trustee as provided in Section 70(a)(5) of the Bankruptcy Act (11 U.S.C. 110(a)(5)). This case will therefore still be pending in the District Court and will proceed there to a final decree upon issues yet to be made and evidence yet to be offered and introduced, in the event *certiorari* is denied in this Court.

Petitioners have not even filed as yet their answer to the respondent's complaint in the District Court, the dismissal order having been entered upon a mere motion. For all respondent or this Court can know, petitioners as defendants in the District Court may offer new and additional defenses in the trial court, having nothing whatever to do with the issues heretofore raised or considered in either the District Court or in the Court of Appeals, which will ultimately dispose of this plenary suit. Such new and additional defenses may raise issues requiring a trial by jury. Should this occur, then this Court's labors in passing upon any of the issues raised in the Petition for Certiorari would be wholly useless and unnecessary, and just so much "time and effort" thrown away.

Although it is true that this Court retains power to grant *certiorari* even though the case has not yet been finally disposed of in the courts below, nevertheless this Court has repeatedly said that "except in extraordinary cases,

the writ is not issued until final decree," and has warned that the circumstance that the decision of the Court of Appeals is not a final one is "a fact that of itself alone furnished sufficient ground for the denial of the application." (*Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258; *American Construction Co.* v. *Jacksonville etc. Ry. Co.*, 148 U. S. 372, 378, 384; and many other cases).

This Court, therefore, might quite properly reject *certiorari* at this preliminary point in this case because there is no certainty that any of the issues raised in the Petition for Certiorari will ever be raised, reached and disposed of in the District Court when the case is tried and the final decree or judgment is ultimately rendered in the trial court.

Of course, the Court of Appeals' opinion is the "law of the case." But *certiorari* does not properly lie to review an expression of opinion in the Court of Appeals upon legal issues, when the case in the District Court may or may not be utimately disposed of upon such issues, but upon other and wholly different issues of of face and law, which, as we have seen above, have not yet been either pleaded or proven in the trial court.

Every litigant who loses in the Court of Appeals might like this Court to "straighten out and correct" for his benefit the expressions as to the "law of the case" in the opinion of the Court of Appeals. But it would greatly overburden, if not overwhelm, this Court should it attempt by granting *certiorari* to comply with such requests.

This Court cannot be expected to review opinions of the Courts of Appeals and grant *certiorari* to correct ex-

pressions therein merely because the losing parties believe they would be better able to make their future defense of the same law suit in the District Court if such review could be obtained.

Upon this ample ground alone, this Court might, and indeed should, properly reject *certiorari* herein at this preliminary point in this litigation. All that follows in this brief can be ignored if this Court decides to reject *certiorari* upon this adequate ground, which its past practice and many decisions clearly warrant.

The Questions Presented.

The questions presented are not truly stated in the Petition for Certiorari (p. 6-7).

The sole substantive issue correctly raised in the Petition for Certiorari is whether, under a proper interpretation of Section 70(a)(5) of the Federal Bankruptcy Act, a Bankruptcy Trustee may administer certain property of a fraudulent bankrupt, consisting of a vested equitable life estate in each of two *inter vivos* non-spendthrift trusts, *which property is fully transferable under both State and Federal law,* in spite of the fact that under an Illinois Statute (Section 49 of the Illinois Chancery Act), if certain proofs were made, such property could not be levied upon by state court creditors.

Section 70(a)(5) of the Bankruptcy Act provides that "title" to all property of the bankrupt which "he could by any means have transferred" is "vested by operation of law" in the Bankruptcy Trustee. Under both Illinois and Federal law, such property as is here involved, *i. e.*, the bankrupt's vested equitable life estates, are fully transferable. All that Section 49 of the Illinois Chancery Act does is to grant the right of state court creditors to levy upon or otherwise satisfy their claims out of such proper-

ties, with an exception in certain limited cases where the trusts are created "in good faith" by a third person.

The "Statement" in the Petition for Certiorari erroneously insists (p. 2-3) that "the sole ground" of the District Court's jurisdiction of the Bankruptcy Trustee's plenary action in the District Court is "an alleged diversity of citizenship"; and the principal point repeatedly made (p. 6-8, etc.) is that this (1) is "a diversity action in the Federal Court" in which (2) the Court of Appeals has "refused to follow local property law." There is no foundation for either of these misstatements, as the opinion of the Court of Appeals clearly shows.

In the first place, Federal jurisdiction in this case is not "grounded solely on diversity of citizenship," in spite of the most insistent repetition of this contention on almost every page of the Petition (p. 6, etc). On the contrary, the opinion of the Court of Appeals clearly and explicitly shows that the jurisdiction of the District Court was also based upon the voluntary "consent of the defendant(s)" under Section 23(b) of the Bankruptcy Act (Title 11, U. S.C.A., Section 46(b)), which provides as follows:

> "Section 23. Jurisdiction of United States and State Courts. • • •
>
> "(b) Suits by . . . the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this act had not been instituted, *unless by consent of the defendant,* except as provided in Sections 60, 67 and 70 of this act." (Italics added.)

That the petitioners (defendants in the District Court) did clearly in fact give their voluntary "consent" to the jurisdiction of the District Court is not only not denied by petitioners, but such actual consent is indisputably shown by the colloquy quoted in the footnote to the opinion of the Court of Appeals (Tr. 237), and also by the further colloquy

which appears on pages 194-5 of the Transcript, from which the colloquy in the footnote is taken. This fact of voluntary "consent" has been confirmed by *both* the District Court and the Court of Appeals (Tr. 219, 236-7), and therefore cannot be disputed in this Court, under the "two-court rule." *U. S.* v. *Commercial Credit Co.*, 286 U. S. 63, 67; and many other cases.

Moreover, even if petitioners had not voluntarily "consented" to jurisdiction of the District Court under Section 23(b), that Court also had jurisdiction under Section 70 (e)(3) of the Bankruptcy Act, in which it is provided that "for the purpose of such recovery," *i. e.*, recovery of the assets belonging to the bankruptcy estate from a third party, "where plenary proceedings are necessary," as in the case at bar, a Federal court "shall have concurrent jurisdiction" with the state courts. *Philips* v. *Turner*, 114 Fed. 726; *Collett* v. *Adams*, 249 U. S. 545; *Rodgers* v. *Bankers Commercial Co., Inc.*, 42 Fed. (2d) 906.

As for the repeated statements in the Petition to the effect that the issue in the Court of Appeals involved "local property rights," "local rules of property," and "a question of Illinois property law" (Petition, p. 6-7, etc.), these statements are also incorrect. As indicated above, the sole substantive issue in this case involves a proper interpretation of Section 70(a)(5) of the Bankruptcy Act, and there is no dispute whatever over the so-called "Illinois property law" holding that the bankrupt's vested equitable life estates are "property" of the fraudulent bankrupt which "he could by any means have transferred" under Illinois law (as well as under Federal law). The undisputed cases are set forth in the Court of Appeals' opinion[1] (Tr. 240-1);

[1] The Merchants' Loan and Trust Co. v. Patterson, 308 Ill. 519; Binns v. LaForge, 191 Ill. 598; Hummel v. Cardwell, 390 Ill. 526; Hiss v. Hiss, 228 Ill. 414; Blair v. Linn, 274 Ill. App. 23; Blair v. Commissioner, 300 U. S. 5; Brown v. Fletcher, 235 U. S. 589.

and none of these authorities is controverted or even referred to in the Petition for Certiorari.

Alleged Reasons For Allowance Of Writ.

Petitioners have not brought themselves within the scope of Rule 38(5) of this Court, which sets forth the limited instances in which *certiorari* will be granted by the Court.

It is not claimed in the Petition for Certiorari (p. 7-8) that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter. Nor is it claimed that a state court has decided a federal question of substance not theretofore determined by this Court or in a way not in accord with applicable decisions of this Court. Nor is it contended that the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

What is claimed under "Reasons for Allowance of Writ" (p. 7-8) is, *first*, that the Court of Appeals has decided an important question of local Illinois property law in a way probably in conflict with applicable local decisions (the sole instance is a *dictum* in *Hummel* v. *Cardwell*, 390 Ill. 526) (Point I), and *second*, that the Court of Appeals has decided an important question of federal law in conflict with the applicable decisions of this Court which require the Federal Court "in this diversity case" to apply "Illinois property law" (*Erie Railroad* v. *Tompkins*, 304 U. S. 64, and cases following it) (Points II and III).

Finally, it is contended, *third*, (p. 8) that the Court of Appeals has decided an important federal question "in direct conflict with the policy established by this Court" under which it is asserted that the Court of Appeals

"should have remanded this case to the District Court with directions to provide appropriate submission to the state court of the question here involved." (Point IV.)

None of these so-called Reasons has any merit.

As shown in the Statement above, and more fully in the Argument below, there is no conflict between the opinion and decision of the Court of Appeals, on the one hand, and the actual decision of the Supreme Court of Illinois in *Hummel* v. *Cardwell*, 390 Ill. 526, on the other hand, upon any "question of Illinois property law," the sole conflict between them being over an interpretation of Section 70(a)(5) of the Bankruptcy Act, which is a question of Federal law and not a question of Illinois property law. (Point I.)

There is likewise no foundation for the contention that the opinion of the Court of Appeals conflicts with the rule in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, because the doctrine of *Erie Railroad* v. *Tompkins* does not in any way preclude the right of the Federal Courts to construe uniformly the Federal Bankruptcy Act and because, if there were a conflict between the Federal Bankruptcy Act, on the one hand, and the Illinois property law purporting to restrict the administrability of the bankrupt's property under the Federal Bankruptcy Act, on the other hand, the latter and not the former would prevail. The cases are set forth in the opinion of the Court of Appeals[1] (Tr. 245-8); and none of these cases is controverted or even referred to in the Petition for Certiorari. (Points II and III.)

[1] Board of Trade of the City of Chicago v. Johnson, 264 U. S. 1; Page v. Edmunds, 187 U. S. 596; In re Landis, 41 Fed. (2d) 700; Board of Trade v. Weston, 243 Fed. 332; Marine Harbor Properties v. Manufacturers Trust Co., 317 U. S. 78; Kalb v. Feuerstein, 308 U. S. 433; Wright v. Union Central Life Insurance Co., 304 U. S. 502.

Where there is no real conflict within the meaning of Rule 38(5) of this Court, as we have shown, the Court, even if *certiorari* had been allowed, would dismiss the writ as improvidently granted. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430; *Tyrell* v. *District of Columbia*, 243 U. S. 1.

As for petitioners' final contention (p. 8) that the Court of Appeals "should have remanded this case to the District Court with directions to provide appropriate submission [whatever that may be] to the state court of the question here involved," this is an issue which was never raised in the District Court, and was never raised in petitioners' brief in the Court of Appeals. This Court has repeatedly stated that it will not consider points not properly raised in or decided by the Federal Courts below (*Adams* v. *Mills*, 286 U. S. 397, 416; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418; and many other cases).

No contention was made in the petitioners' original or amended motion to dismiss complaint (Tr. 10, 181) that any issues in the complaint should be submitted to the state court. Nor was any such contention made in petitioners' so-called Appellees' Brief in the Court of Appeals. This idea really makes its first significant appearance in this case in the Petition for Certiorari in this Court. The case of *Thompson* v. *Magnolia Co.*, 309 U. S. 478, was cited (p. 48) in Appellees' Brief in the Court of Appeals (but without any suggestion that respondent should have been directed in the Joslyn Bankruptcy Case to bring a plenary action in the State Court as in the *Thompson* case), and as Point IV of their Petition for Rehearing in the Court of Appeals (Tr. 262-3), petitioners for the first time contended that "this case should be remanded for a state court proceeding," but without showing how this should or could be done.

As shown in the Argument below, the Court of Appeals had no power to remand this plenary case to the District Court "with directions to provide appropriate submission [sic] to the state court of the question here involved." This is an appeal in a plenary case, and is *not* an appeal in a bankruptcy case where directions to the Trustee in Bankruptcy as to the prosecution of litigation may appropriately be given. The power of the Court of Appeals in this plenary suit was necessarily limited either (1) to affirming the order of dismissal in the District Court, or (2) to reversing such order and remanding with directions to the District Court to proceed with the litigation in due course. There is no power or jurisdiction in the Federal Courts to transfer a plenary suit already pending in a District Court to a State Court for further litigation . Nor is there any power or jurisdiction in the Federal Courts in a plenary suit (as distinguished from a bankruptcy case), especially in the Court of Appeals, to direct the Bankruptcy Trustee to dismiss his case and proceed in some other court or forum.

Petitioners have, therefore, completely failed to bring themselves within the scope of Rule 38(5) of this Court by showing any conflict in decisions which would justify the granting of the writ in Appeal No. 695.

Certiorari Should Be Denied In Appeal No. 696.

Appeal No. 696 in this Court is a so-called cross-appeal by petitioners from findings and orders in the District Court holding that it had jurisdiction of the subject matter (Tr. 221).

Not only was this cross-appeal taken by petitioners from an order in their own favor granting them all of the relief prayed, as the Court of Appeals found (Tr. 237), but there

is not one word in the Petition for Certiorari which controverts the District Court's jurisdiction on at least diversity grounds. Nor do petitioners in any way controvert the finding of fact by both the District Court (Tr. 218-9) and by the Court of Appeals (Tr. 235-7) that the petitioners as defendants voluntarily consented to jurisdiction under Section 23(b) of the Bankruptcy Act. Moreover, petitioners themselves concede in their Petition for Certiorari (p. 2) that the District Court had jurisdiction of this action, although they erroneously state that such jurisdiction was based "on the sole ground of an alleged diversity of citizenship."

It is obvious that the writ of certiorari sought in Appeal No. 696 must be peremptorily denied in this Court for failure to show any reason whatsoever in the Petition why such writ challenging an admitted jurisdiction should be granted.

ARGUMENT.

I.

The Court of Appeals did not interpret Section 49 of the Illinois Chancery Act in direct conflict with the Decision of Hummel v. Cardwell, 390 Ill. 526, nor decide a question of Illinois property law contrary to the Illinois Statutes and Decisions in a diversity case.

We have already shown in the Statement above that the jurisdiction of the District Court in this plenary suit is not "grounded solely on a diversity of citizenship," as the Petition for Ceriorari repeatedly states (p. 6-7, etc.). On the contrary, the Federal Court's jurisdiction is not only based upon diversity of citizenship (which jurisdiction is conceded in the Petition for Certiorari (p. 2)), but is also based upon the voluntary consent found by both the District Court and the Court of Appeals to have been deliberately given by the defendants in the District Court under Section 23(b) of the Federal Bankruptcy Act, and also upon the fact that this is a plenary action to recover property belonging to the bankruptcy estate from third persons within Section 70(e) of the Bankruptcy Act.

However, we wish to make it clear that it would make no difference whatever if this were a case in which jurisdiction is "grounded solely on diversity of citizenship," for the reason that this plenary suit is brought to recover property, the "title" to which has "vested" in the Bankruptcy Trustee as property which the bankrupt "could by any means have transferred," and which is therefore administrable in bankruptcy under Section 70(a)(5) of the Fed-

eral Bankruptcy Act. It being conceded in the Petition for Certiorari (p. 2), and undeniably established by the admitted facts, that diversity jurisdiction exists, it necessarily follows that the Federal Court is the principal and proper court to construe the ultimate meaning and effect of Section 70(a)(5) of the Federal Bankruptcy Act; and the case of *Erie Railroad* v. *Tompkins* has not the slightest effect to prevent the Federal Court from construing such a uniform federal law in relation to bankruptcy as the Bankruptcy Act, some of the many cases so holding being cited in the opinion of the Court of Appeals (Tr. 248).

It necessarily follows that the argument contained in the Petition for Rehearing in relation to *Erie Railroad* v. *Tompkins* is based upon a misconception of the rule announced in that case. We discuss that decision, and the other cases following *Erie Railroad* v. *Tompkins,* under our Points II and III below.

Petitioners' principal contention under their Point I of their "Argument" is that the opinion of the Court of Appeals is in "direct conflict" with the decision in the *Hummel* case in the Illinois Supreme Court, and that this so-called "direct conflict" has to do with an interpretation of Section 49 of the Illinois Chancery Act and therefore involves "a question of Illinois property law." It is petitioners' principal contention that the Court of Appeals construed Section 49 contrary to the Illinois statutes and decisions.

There is not the slightest foundation for this contention. As the Court of Appeals' opinion clearly shows, the only question of Illinois property law involved in this case or in the *Hummel* case was whether the vested equitable life estate of a beneficiary under a non-spendthrift trust is transferable property under Illinois law, including Section

49 of the Illinois Chancery Act. The Court of Appeals has correctly cited (Tr. 240-1) *The Merchants Loan and Trust Co.* v. *Patterson,* 308 Ill. 519; *Binns* v. *LaForge,* 191 Ill. 598; *Hiss* v. *Hiss,* 228 Ill. 414; *Blair* v. *Linn,* 274 Ill. App. 23; *Blair* v. *Commissioner,* 300 U. S. 5; *Brown* v. *Fletcher,* 235 U. S. 589; and, finally, the very opinion in *Hummel* v. *Cardwell,* 390 Ill. 526, all as authority holding that both under Illinois law and under Federal law the bankrupt's vested equitable life estates here involved were transferable property.

Perhaps we should also add, though not noted by the Court of Appeals' opinion, that the fraudulent bankrupt himself treated his vested equitable life estates involved in this case as transferable property, as the Special Master in the bankruptcy case found (Tr. 125, 189).

None of these authorities are controverted by the Petition for Certiorari. The only case cited in the Petition (p. 15, 21) as contrary is *Hopkinson* v. *Swaim,* 284 Ill. 11. This was a spendthrift trust case, and is therefore without the slightest applicability to the issue of transferability of vested equitable life estates under such non-spendthrift trusts as are involved in the case at bar.

As for the *Hummel* case itself, this case squarely held that the bankrupt's vested equitable life estate was transferable, as the Court of Appeals noted in its opinion (Tr. 240-1).

So far as the Supreme Court of Illinois held in the *Hummel* case that Section 49 constitutes "a rule of property and not of procedure only," this rule of property is that a vested equitable life estate of a beneficiary under an Illinois non-spendthrift trust is transferable property, even though it is not subject to levy under Section 49, *i.e.,* such vested equitable life estate may be fully and freely trans-

ferred by the beneficiary, regardless of Section 49. The argument in the Petition for Certiorari (p. 14) that the *Hummel* case did not confirm such transferability because the *Hummel* case held that a vested equitable life estate is not administrable under Section 70(a)(5) of the Bankruptcy Act merely shows that the true conflict between the *Hummel* case and the opinion of the Court of Appeals is over the interpretation of the Bankruptcy Act, and not over Section 49.

This true conflict between the *Hummel* case and the Court of Appeals' opinion relates exclusively to the correct interpretation of Section 70(a)(5) of the Bankruptcy Act. This is shown by that part of the Illinois Supreme Court's opinion in the *Hummel* case which appears on pages 533-535 of the opinion, the concluding paragraph of which is quoted in the Petition for Certiorari (p. 13-14).

Respondent fully concedes that the construction of Section 70(a)(5) of the Bankruptcy Act by the Illinois Supreme Court in the *Hummel* case is at variance with the construction of the same clause placed thereon by the Court of Appeals' opinion in the case at bar. But this divergent construction of Section 70(a)(5) of the Bankruptcy Act bears not the slightest relation to Illinois property law or to the so-called "rule of property" established by Section 49.

Thus we see that there is no important question of local law decided by the Court of Appeals in a way probably in conflict with applicable local decisions, so as to permit *certiorari* under Rule 38(5) of this Court. The decision in the case at bar by the Court of Appeals was that the order of dismissal of respondent's complaint in the District Court should be reversed with directions to proceed further in the trial court in accordance with the conclusion that Section

49 was not a barrier to the transferability and consequent administrability in bankruptcy of the vested equitable life estates, the "title" to which had "vested" in the Bankruptcy Trustee under Section 70(a)(5) of the Bankruptcy Act.

An examination of the opinion of the Illinois Supreme Court in the *Hummel* case clearly shows that the purported interpretation therein of Section 70 of the Bankruptcy Act constituted mere *dictum* and was not necessary to the Illinois Supreme Court's decision in the *Hummel* case. In other words, there was an adequate and independent non-federal ground of decision to support the judgment in the *Hummel* case, in that the Illinois Supreme Court squarely held that by virtue of two "consent decrees" the bankrupt, Huszagh, had voluntarily transferred her vested equitable life estate in an Illinois non-spendthrift trust more than four months prior to her adjudication in bankruptcy. When the *Hummel* case was brought upon a petition for *certiorari* before this Court, it was vigorously maintained by the transferee (the respondent in that case) that, such transfer having been made more than four months prior to the bankruptcy, the decision of the Illinois Supreme Court was correct upon the non-federal ground in any event, and that therefore the purported interpretation of Section 70 of the Bankruptcy Act was merely *obiter dictum* (Tr. 187). All of the text writers who have had occasion to discuss the *Hummel* case, while agreeing that the decision was correct for the reason mentioned, have vigorously assailed the *dictum* in the *Hummel* case purporting to construe Section 70(a)(5) of the Federal Bankruptcy Act. (See 41 Ill. Law Review, p. 214-7; 34 Ill. Bar Journal No. 6, p. 262-4; Illinois Law of Future Interests (Carey and Schuyler), 1947, Pocket Parts, page 137; 44 Ill. Law Review, p. 736-7.)

None of the other cases cited by petitioners under their Point I are in conflict with what is said above. The case of *Potter* v. *Couch*, 141 U. S. 296, held that Section 49 constitutes a "rule of property," but this case did not involve a vested equitable life estate in an Illinois non-spendthrift trust, nor the transferability thereof under both Illinois and Federal law, and the consequent administrability thereof under the Federal Bankruptcy Act.

As for the case of *Spindle* v. *Shreve*, 111 U. S. 542, it clearly appears from the Court of Appeals' opinion (Tr. 244) that this case involved a spendthrift trust and was decided in 1884 under the Bankruptcy Act of 1873, which early Bankruptcy Act did not provide that transferable property is administrable property, as did the Bankruptcy Acts of 1898 and 1938, both of which specifically so provided in Section 70(a)(5). The case of *Knight* v. *Gregory*, 389 Ill. 554, held that Section 49 is not an exemption statute, and that Section 49 was passed solely for the purpose of giving effect to the common law rule that no jurisdiction existed in equity to entertain a creditor's bill to reach a beneficial interest under a trust which was not set up by the debtor himself. The case bears no relationship to bankruptcy whatsoever.

The case of *Durant* v. *Hospital Life Insurance Company*, Federal Cases No. 4188, had reference to the Bankruptcy Act of 1869 which, like the Bankruptcy Act of 1873, did not provide for administrability in bankruptcy of transferable property, as did both the Acts of 1898 and 1938.

As for the case of *Eaton* v. *Boston Trust Co.*, 240 U. S. 427, to which petitioners devote two pages (p. 18-19), this case is correctly analyzed in the opinion of the Court of Appeals (p. 244-5) as a holding directly contrary to the interpretation placed thereon in the Petition for Certiorari.

As the Court of Appeals' opinion correctly states, the *Eaton* case involved a spendthrift trust, as Judge Holmes specifically held, citing *Boston Safe Deposit & Trust Co.* v. *Luke*, 220 Mass. 484, 108 N. E. 64 to that precise effect. Later Massachusetts cases squarely hold that a Bankruptcy Trustee may administer beneficial interests in non-spendthrift trusts, identical with the Joslyn Trusts in this respect. See also *National Shawmut Bank* v. *Fitzpatrick*, 256 Mass. 125, 152 N. E. 328; *Forbes* v. *Snow*, 245 Mass. 85, 140 N. E. 418, both of which were decided subsequently to the *Luke* and *Eaton* cases, thus confirming the Court of Appeals construction of the *Eaton* case. The purported construction of the *Eaton* case in the Petition is simply erroneous, and the true holding in that case is fully in conformance with the Court of Appeals' opinion in the case at bar.

The Petition for Certiorari devotes two pages (p. 20-1) to arguing that the Court of Appeals' opinion, if allowed to stand, will create "two bodies of property law in Illinois, one applicable in actions decided by the State courts and another in diversity actions in the federal courts"; and that this will have "dire effects upon the Illinois law of trusts and the property rights of settlors and beneficiaries alike."

There is no foundation for this contention. The Court of Appeals' decision in no way creates a new body of property law in Illinois. All that it does is to apply the statutory enactment of Section 70(a)(5) of the Bankruptcy Act with uniformity throughout the United States, including the State of Illinois, whereby all property which under local "rules of property" is held to be transferable shall be thereby administrable in bankruptcy.

In truth and in fact, as to the petitioners' argument of "dire effects," the shoe is entirely on the other foot. If

the position taken by petitioners were upheld, all uniformity of bankruptcy administration throughout the United States would be destroyed by the elimination of the uniform rule that all transferable property is administrable in bankruptcy, and by substituting therefore the rule that whatever differing restrictions may exist limiting the rights of local state court judgment creditors to levy upon their debtor's property, under the forty-eight different State Statutes relative thereto, shall be equally applicable in bankruptcy. Indeed, there would be no need for a Federal Bankruptcy Act under Article I, Section 8 of the Federal Constitution permitting Congress to "establish . . . uniform laws on the subject of bankruptcies throughout the United States," if all transferable properties are not to be uniformly administered in bankruptcy, as is provided in Section 70(a)(5) of the Bankruptcy Act.

This Court has long since disposed of the petitioners' prime contention by holding that all transferable property is subject to bankruptcy administration under the Federal Bankruptcy Act regardless of whether or not it is subject to levy under the laws and statutes of the several states. The cases of *Board of Trade* v. *Johnson,* 264 U. S. 1, and *Page* v. *Edmunds,* 187 U. S. 596, cited in the Court of Appeals' opinion (p. 246) both squarely held, in spite of decisions in the Illinois and Pennsylvania Supreme Courts directly to the contrary, that transferable property is administrable in bankruptcy under Section 70 (a)(5) of the Federal Bankruptcy Act, regardless of whether or not such property was subject to levy under the laws and statutes of Illinois and Pennsylvania, respectively. The statement in the Petition for Certiorari (p. 20-1) that the Court of Appeals' opinion in this case grants a Bankruptcy Trustee "a new remedy and relief never granted heretofore to any creditor bankruptcy trustee" is not only contradicted by the foregoing decisions of this Court, but by

countless other decisions in all of the other Circuit Courts of Appeals in which this issue has arisen. Among the cases to which we refer are the following:

Fisher v. *Cushman,* 103 Fed. 860 (1st Cir.) (a liquor license which was transferable and was therefore held administrable, although not subject to levy or execution under Massachusetts law);

In re Coleman, 136 Fed. 818 (2nd Cir.) (a right to change the beneficiary in a life insurance policy which was transferable and was therefore held administrable, although not subject to levy or execution under New York law);

In re White, 174 Fed. 333 (2nd Cir.) (same, under New York law);

In re Wright, 157 Fed. 544 (2nd Cir.) (same as to insurance commissions, under New York law);

In re Orear, 178 Fed. 632 (8th Cir.) (same, under Missouri law);

Pollack v. *Meyer Bros. Drug Co.,* 233 Fed. 861 (8th Cir.) (a vested equitable interest in trust property which was held transferable and was therefore held administrable, although not subject to levy or execution under Missouri law);

Whittridge v. *Sweetser,* 75 N. E. 222, affirmed 204 U. S. 538 (same, under Massachusetts law);

U. S. v. *Schireson,* 116 Fed. (2d) 881 (3rd Cir.) (same, under Pennsylvania law);

In re Irwin, 60 Fed. (2d) 495 (10th Cir.) (a vested equitable right in income from Indian headrights which was held transferable and therefore administrable, although not subject to levy or execution under Oklahoma law);

In re Landis, 41 Fed. (2d) 700 (7th Cir.) (a contin-

gent trust interest which was held transferable and therefore administrable, although not subject to levy or execution under Illinois law).

All of the foregoing decisions were based upon the uniform interpretation of the Federal Bankruptcy Act which is confirmed by the Court of Appeals' opinion in this case. The interpretation placed upon the Bankruptcy Act in the *dictum* in the *Hummel* case, on the other hand, would produce chaos in bankruptcy administration, by reducing the Bankruptcy Trustee's claim to administer property to the rights of judgment creditors under the 48 different rules in the various states. A bankrupt corporation having identical assets in various states would find its assets come within bankruptcy administration in some of the states, but not in others where different state laws and statutes govern a judgment creditor's rights.

Instead of producing "two bodies of property law in Illinois," therefore, the Petition for Certiorari would substitute 48 different rules in place of the uniform administrability of transferable property throughout the forty-eight states, which uniformity was the very purpose for which Article I, Section 8 of the Federal Constitution in relation to the establishment of "uniform laws on the subject of bankruptcies throughout the United States" was inserted in the Federal Constitution.

II.

The doctrine of Erie Railroad v. Tompkins, 304 U. S. 64, does not apply to Federal Statutes such as the Federal Bankruptcy Act.

Under their Point II, petitioners cite the *Erie* case as authority for the proposition that the Federal Courts "in diversity actions brought by trustees in bankruptcy" are

compelled to follow state decisions with respect to what constitutes "property," together with *Guaranty Trust Co.* v. *York*, 326 U. S. 99, and *Angel* v. *Bullington*, 330 U. S. 183. At the same time, they seek (p. 23) to distinguish *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78.

This is a complete misunderstanding of the rule in *Erie Railroad* v. *Tompkins*. This rule has never been applied to Federal statutes, such as the Federal Bankruptcy Act, which take precedence over all local rules of law in conflict therewith. This is made clear by the cases cited in the Court of Appeals' opinion (p. 248-9), including *Marine Harbor Properties, Inc.* v. *Manufachurers Trust Co.*, 317 U. S. 78, *Kalb* v. *Feuerstein*, 308 U. S. 433, and *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502, all of which hold that federal bankruptcy power "is paramount and supreme," even though it may "modify and affect the property rights established by state law." This Court has also specifically held in *Heiser* v. *Woodruff*, 327 U. S. 726, that *Erie Railroad* v. *Tompkins* does not require the Federal Courts to follow local rules of law in applying the uniform Federal Bankruptcy Act. In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176, this Court specifically declared that the *Erie* case is inapplicable to "the sweep of federal statutes." See also *Wragg* v. *Federal Land Bk.*, 317 U. S. 325, holding that rights created by state law and statutes are wholly subordinate to the applicability of the Federal Bankruptcy Act, citing *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89.

The cases cited by petitioners are in no way contrary to the foregoing decisions. Both the *Guaranty Trust Co.* case and the *Angel* case dealt with interpretations of state statutes, and neither of them involved bankruptcy or any other broad federal statute similar thereto. In fact, this Court

made the distinction clear by saying in the *Guaranty Trust* case (p. 101):

> "We put to one side the considerations relevant in disposing of questions that arise *when a federal court is adjudicating a question based on federal law.*" (Italics added.)

Petitioners' final sentence under their Point II again claims that the Court of Appeals' opinion "will breed conflict between the Federal and State Courts where there has been harmony heretofore." As indicated at the end of our discussion of their Point I above, exactly the contrary is the case. If the Bankruptcy Courts are compelled to follow the doctrine of the *Hummel* case, there will be not only conflict but utter chaos in the administration of the uniform Federal Bankruptcy Act where, with the sole exception of the dictum in the *Hummel* case purporting to construe the Federal Bankruptcy Act, there has been "harmony heretofore."

III.

The argument that the Court of Appeals should not have held that transferable property is administrable under Section 70(a)(5) of the Federal Bankruptcy Act, upon the theory that this case is "grounded solely upon diversity of citizenship," is without merit.

Under their Point III petitioners cite *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, in support of the proposition that the Federal Court should in a diversity of citizenship case bar Bankruptcy Trustees from administering transferable property.

The *Woods* case involved a purely local issue, namely, whether an unqualified foreign corporation should be barred from suing in the Federal Court in Mississippi when the same corporation was barred from suing in the Mississippi

State Courts by the local Mississippi statute. This Court held, citing *Erie Railroad* v. *Tompkins,* that the Federal Courts should not grant a right to sue in the Federal Courts to a foreign corporation which, by virtue of its not being qualified to do business in Mississippi, was forbidden to sue in the Mississippi State Courts.

Plainly this case has nothing whatever to do with the uniform Federal Bankruptcy Act, nor any issue involved in the case at bar. The *Woods* case cites and relies upon *Guaranty Trust Co.* v. *York,* 326 U. S. 99, which specifically excludes the applicability of the *Erie Railroad* case "when a federal court is adjudicating a question based on federal law," such as the uniform Federal Bankruptcy Act, as we have already shown above.

Moreover, this Point III is also without merit since it is based upon the untenable theory that the District Court in the case at bar had only diversity jurisdiction, when in fact it also had jurisdiction under Sections 23(b) and 70(e)(3) of the Bankruptcy Act, as above indicated.

IV.

The argument that this action should be transferred to the State Court, or dismissed so as to require the Bankruptcy Trustee to sue in the State Court, is an issue which was not raised in the District Court or in the Court of Appeals until the filing of the Rehearing Petition therein, and which is otherwise without merit.

As their Point IV, petitioners argue that this plenary suit should have been remanded by the Court of Appeals "with directions to have the question of Illinois property law submitted to state courts for a determination." Three cases are cited in support of this proposition: *Thompson* v. *Magnolia Co.,* 309 U. S. 478; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; and *Mangus* v. *Miller,* 317 U. S. 178.

In the first place, there is no "question of Illinois property law" involved in the case at bar. On the contrary, as we have clearly shown above, the sole issue is whether Illinois property, which is held by both Illinois and Federal law to be fully transferable, is thereby within the sweep of the uniform Federal Bankruptcy Act which provides in Section 70(a)(5) that all transferable property shall be administrable in bankruptcy.

There is nothing in any one of the three cases cited by petitioners in conflict with the foregoing. On the contrary, the issues in each of these three cases were purely local issues subject to the ultimate decision of the local state courts. Whereas, in the case at bar, the only issue is a federal issue which is ultimately determinable only in the Federal Courts because it arises only under Federal law.

In the *Thompson* case, the question as to whether a local issue should be left to the state law arose in the bankruptcy case itself, and not in a plenary suit already commenced by the bankruptcy trustee, as in the case at bar. The issue in that case was purely local, for it involved solely a question of local land title law (oil rights under a right-of-way owned by a railroad). The *Fieldcrest Dairies* case dealt exclusively with a local issue of Illinois law, and this Court ruled that the case should be returned to the District Court with directions to withhold final decision there until the Illinois State Courts had had time to decide such issue. The *Mangus* case involved a Utah statute relating to the purely local issue of land title law distinguishing tenancies-in-common from joint tenancies.

It is obvious that none of these three cases has the slightest applicability to the issue arising under the broad sweep of the uniform Federal Bankruptcy Act which is involved in this case.

Under their Point IV petitioners also maintain that even if the opinion in the *Hummel* case contained mere *dictum* on the point in issue here, it must nevertheless be followed in the Federal Courts, citing *Hawks* v. *Hamill*, 288 U. S. 52 and *Yoder* v. *Nu-Enamel Corporation*, 117 Fed. (2d) 488. These cases, however, concerned interpretations of Oklahoma and Nebraska Statutes, respectively, and not a Federal Statute constitutionally required to be uniform in its operation throughout the United States. Such *dicta*, therefore, are not binding upon the Federal Courts and are not followed by the Federal Courts when such expressions are in conflict with the Federal Court's construction of the Federal Bankruptcy Act.

As we have already indicated above, the Court of Appeals had no power to follow the suggestion recommended under Point IV of the Petition for Certiorari. The Court of Appeals could only affirm or reverse the order of dismissal in the District Court. It could neither direct that the plenary case be transferred to the state court, on the one hand, nor direct the Bankruptcy Trustee to bring a new plenary suit in the state court, on the other hand.

All that their Point IV really amounts to is that petitioners seek to preserve the misconstruction of the Federal Bankruptcy Act inherent in the *dictum* in the *Hummel* case decided by the Illinois Supreme Court. This is made clear by the statement in their "Conclusion," in which petitioners repeat their contention that the failure to compel the Federal Court to follow this *dictum* will result in "two bodies of property law in Illinois," in place of "uniformity in the state courts and Federal courts in diversity actions."

We have already seen that this reference to diversity actions is not only inapplicable to the case at bar, but is a false issue, for the cases cited above in the Court of Appeals'

opinion and decided by this Court clearly hold that not only the lower Federal Courts, but the State Courts as well, are compelled to adopt the uniform construction of the Federal Bankruptcy Act which has been adopted by this Court and all of the several Courts of Appeals. Apparently petitioners seek to have one rule of construction of the uniform Federal Bankruptcy Act in Federal Courts in diversity actions, and another rule, apparently to be governed by State Court decisions, in the Federal Courts in non-diversity actions. This would indeed result in a state of chaos in relation to bankruptcy which it is hard to believe that even petitioners would recommend. Yet this would be the inevitable result of the position taken in the Petition for Certiorari.

Conclusion.

We conclude that this is clearly not a case for *certiorari*. It is still in its preliminary stages, so that none of the issues presented here may be those upon which the case is ultimately tried in the District Court and disposed of there. This Court does not grant *certiorari* merely to enlighten the parties or correct expressions in the Court of Appeals which the petitioners believe erroneous. There is no conflict between the Court of Appeals decision in this case, and the decisions in any other Court of Appeals. On the contrary, the decision in this case is in conformity with all of the earlier decisions in this Court and in every other Court of Appeals, six of which have already decided the same questions in the same way. The only contrary view is a *dictum* in the Illinois court in the *Hummel* case, in which case *certiorari* was no doubt rejected in this Court because the actual decision was correct upon a non-federal ground. All the text writers, and the Federal Court itself in *Hodam* v. *Jordan*, 82 Fed. Supp. 183, 189 (Tr. 248), have alike condemned this *dictum* and characterized it as such. And

finally, a contrary result in this case would actually produce chaos in the form of 48 different rules as to *what* transferable property is administrable in bankruptcy, in place of the uniformity which now exists that *all* transferable property is administrable by Bankruptcy Trustees under the Uniform Federal Bankruptcy Act.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by *certiorari*, and that the Petition for such Writ should be denied.

Respectfully submitted,

HORACE A. YOUNG, *Pro Se*,
Attorney for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 695 and 696

BENTLY S. HANDWORK, RALPH C. BOOZER, AND PHILIP W. LOTZ, INDIVIDUALLY AND AS TRUSTEES, ETC.,
Petitioners,

vs.

HORACE A. YOUNG, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF GEORGE R. JOSLYN, BANKRUPT,
Respondent.

PETITION FOR REHEARING.

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Respondent.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The petitioners, by their attorneys, present herewith their petition for a rehearing of their petition for certiorari to the United States Court of Appeals for the Seventh Circuit and state as follows:

I.

All Illinois Trusts Except Those Made Expressly Inalienable Would Be Subject to Destruction by the Court of Appeals' Ruling.

The ruling of the Court of Appeals in this case will make possible the dissipation or destruction of all Illinois trusts for the benefit of widows and children of settlors where no express language against alienability has been em-

ployed in the trust instrument. This will include valid Illinois spendthrift trusts which are expressly made immune from claims of creditors and from anticipation by the beneficiary himself.

It has been well established in Illinois that the Illinois statute involved here (Section 49 of Chapter 22, Ill. Rev. Stats.) makes all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of a beneficiary or against a bankruptcy trustee, representing creditors' interests. *Spindle* v. *Shreve,* 111 U. S. 542, 547, *Knight* v. *Gregory,* 389 Ill. 554, 561, *Hummel* v. *Cardwell,* 390 Ill. 526, 534, (see also note in 119 A. L. R. 41). Creditors' bills, garnishments and attachments have been unavailing in previous attempts to reach the income from trust property in the hands of Illinois trustees. If, despite the bar of the Illinois statute, a bankruptcy trustee may now be permitted to recover, there is no basis for assuming that judgment creditors' attempts will be less successful.

If capable of transfer, as erroneously decided by the Court of Appeals, all trusts (including spendthrift trusts containing express provisions against creditors and anticipation by the beneficiary) will be subject to creditors' bills, garnishments and attachments as well as seizure by a bankruptcy trustee (*Hopkinson* v. *Swaim,* 284 Ill. 11, 23).

Widows and minors whose support and maintenance has been provided by settlors and deceased testators in reliance upon the Illinois Statute and decisions may no longer look to the Courts for protection if the Court of Appeals' decision is to stand, for, under that ruling, the trust income intended for them may be taken before it ever reaches their hands.

The dire consequences which may follow in the wake of the Court of Appeals' ruling appear from attacks against the Illinois Statute commenced many years ago, both with

respect to suits by creditors and by bankruptcy trustees (see 38 Illinois Law Review, page 335; 38 Illinois Law Review, 408; 41 Illinois Law Review, 214-227). In the face of these attacks the Illinois Supreme Court, and the Federal Courts sitting in Illinois, have heretofore consistently sustained the immunity of such trust interests in the hands of active trustees (see *Baumgardner* v. *R. F. C.*, 131 F. 2d 741 (C. C. A. 7); *Dunham* v. *Kauffman*, 385 Ill. 79, and *Hummel* v. *Cardwell*, 390 Ill. 526). The opinion of the Court of Appeals in this case is in direct conflict with these decisions and it is to be anticipated that the argument will hereafter be made that the Court of Appeals' ruling should be regarded as authority for upsetting these decisions and the numerous other cases which have established and applied this Illinois rule of property ever since the adoption of the Illinois Statute in 1845 (see Sec. 22 of Ch. 49, Ill. Rev. Stats. Ann.).

Another chaotic consequence that may also affect all such Illinois trusts concerns the facility with which a beneficiary may hereafter destroy a trust intended for his benefit. Heretofore this has been virtually impossible.

Hereafter, a beneficiary desiring to obtain possession of the corpus of a trust in which he has only a right to the income, may accomplish his purpose by deliberately incurring debts and thereafter filing a voluntary petition in bankruptcy. In this manner the designing beneficiary may defeat the entire purpose of the settlor by forcing a sale of the trust interest intended for his benefit and, after payment of the debts scheduled in bankruptcy, the remaining corpus of the trust will be turned over to him pursuant to Section 66 of the Bankruptcy Act (Title 11, U. S. C. Ch. 7, Sec. 106).

Thus, the decision of the Court of Appeals, if allowed to stand, will nullify the Illinois statute and overrule an

entire segment of Illinois property law, making possible the destruction of a great number of Illinois trusts.

II.

The Court of Appeals Was Without Authority to Substitute Its Independent Interpretation of Illinois Property Law.

It cannot be disputed that the Court of Appeals decided a question of Illinois property law. This was acknowledged in its opinion (R. 249).

In so doing the Court of Appeals not only decided the question of Illinois law contrary to the decisions of the Illinois Supreme Court, but it also reversed the District Court in the person of the Honorable Elwyn R. Shaw, for many years a Justice (and later Chief Justice) of the Supreme Court of Illinois.* Upon the question of Illinois property law which the Court of Appeals reversed, Judge Shaw's order recited unequivocally that "this question of law is free from doubt" (R. 203).

While this Court should not be required to interpret the Illinois statute and cases upon which the decision in this case rests, neither should the action of the Court of Appeals in overriding the Illinois cases and the District Court's ruling be permitted to stand.

The independent ruling of the Court of Appeals (conflicting as it does with the Illinois cases) constitutes a precedent more startling than any which have been established since *Erie* v. *Tompkins* on the question of a Federal Court's authority and obligations in diversity cases.

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* Who's Who in America (1942-1949), p. 2231.

III.

This Court Overlooked Its Decision in Eaton v. Boston Trust Co., 240 U. S. 427.

Even if this Court considered that the interests in the Joslyn Family Trusts held by petitioners as Trustees were "transferable", the holding of the Illinois courts in denying relief to a bankruptcy trustee in a plenary suit should be respected. The denial of certiorari results in a decision which is in direct conflict with *Eaton* v. *Boston Trust Co.*, 240 U. S. 427 (1916) where this Court considered the availability of similar trust interests in the hands of active trustees and where the Massachusetts courts had held that the trust interests were transferable. Notwithstanding those decisions, this Court denied relief to a bankruptcy trustee where the Massachusetts courts had done likewise (p. 429).

The same section of the same bankruptcy act involved here was also involved there. That decision has been cited and relied upon by lawyers and courts for almost 35 years. The denial of certiorari in this case will be regarded as a disposition to overrule the *Eaton* case without any explanation for such drastic action.

IV.

If the Basis of Denial of Certiorari Is That There Was No Final Judgment in the Court of Appeals, This Court Is Urged to Amend Its Order of Denial by Setting Forth This, as the Reason Therefor.

It was vigorously urged by respondent that certiorari should be denied in this case for the reason that no final judgment had been rendered by the Court of Appeals (Res. Br. 2-5). The reasons for filing our petition for certiorari *at this time* were as follows:

a. The Court of Appeals rendered two separate judgments, one of which *was* a final judgment affirming the District Court's holding of diversity jurisdiction (R. 251).

b. By stating in its opinion that it was deciding this case "on the merits" the Court of Appeals made it incumbent upon petitioners to apply for certiorari at this stage of this case even though the judgment of the Court of Appeals upon the main issue here was that this cause be reversed and remanded to the District Court with directions to proceed in accordance with the conclusion reached in the opinion (R. 250).

In order that this Court's denial of certiorari may not be regarded as approving the action of the Court of Appeals in disregarding Illinois property law, it is respectfully urged (in the alternative) that this Court amend its order denying certiorari by adding the words "for want of jurisdiction" or by explaining that denial of certiorari is for the reason that there was no final and appealable order upon which a petition for certiorari might be based. *Chicago and Northwestern Railway Co.* v. *Osborne,* 146 U. S. 354, *Wishkah Boom Co.* v. *U. S.,* 202 U. S. 613, *City of Omaha* v. *The Omaha Water Co.,* 207 U. S. 584.

Conclusion.

WHEREFORE, petitioners pray that this Court may grant a rehearing and reconsider its order denying certiorari herein, or in the alternative, that the order denying certiorari may be amended to recite that denial of certiorari was for the reason that the judgment of the Court of Appeals was not final and appealable.

Respectfully submitted,

BENTLY S. HANDWORK,
RALPH C. BOOZER,
PHILIP W. LOTZ,
Individually and as Trustees, etc.,
By HOMER D. DINES,
JOSEPH A. CONERTY,
ROBERT MCCLORY,
Their Attorneys.

DAILY, DINES, WHITE & FIEDLER,
122 South Michigan Avenue,
Chicago 3, Illinois,
Of Counsel.

CERTIFICATE.

I hereby certify that I am one of the attorneys for the petitioners in the above-entitled cause and that I am a member of the bar of this court. I further hereby certify that the foregoing Petition for Rehearing is made in good faith and in my opinion is well founded in point of law and is not filed herein for purposes of delay. I further hereby certify that this petition is restricted to the grounds above specified.

HOMER D. DINES.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 995 and 996

BENTLY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, etc.,
Petitioners,

vs.

HORACE A. YOUNG, as Trustee in Bankruptcy of the Estate of George R. Joslyn, Bankrupt,
Respondent.

RESPONSE OF HORACE A. YOUNG TO THE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

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135 So. La Salle St.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 695 and 696

BENTLY S. HANDWORK, RALPH C. BOOZER, and PHILIP W. LOTZ, Individually and as Trustees, etc.,
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vs.

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Respondent.

RESPONSE OF HORACE A. YOUNG TO THE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

Respondent, Horace A. Young, earnestly opposes the petition for rehearing of the petition for certiorari to the United States Court of Appeals for the Seventh Circuit for the reasons hereinafter set forth.

I.

The Certificate Of Counsel Does Not Comply With The Provisions Of Rule 33 Of This Court.

Rule 33 of this Court, provides, in pertinent part:

> "Any petition (for rehearing) filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1; *Massey* v. *United States*, 291 U.S. 608), or to other substantial grounds available to petitioner although not previously presented (e.g. *Schriber Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and *counsel must also certify that the petition is restricted to the grounds above specified.*" (Emphasis supplied.)

Counsel for petitioners has failed to comply with Rule 33 in that he has failed to certify, as the Rule says he must, that the petition is restricted to (1) intervening circumstances of substantial or controlling effect, or (2) other substantial grounds available to petitioner although not previously presented.

If this failure to so certify were a mere oversight or inadvertent omission it might be overlooked. However, an examination of the cases cited in the Rule shows beyond all doubt that counsel for petitioners cannot, in good conscience, comply with the Rule. He does not and cannot show that, since the decision in the District Court, or since the decision in the Court of Appeals, or since the order in this Court denying the petition for certiorari, there are

any intervening circumstances of a substantial or controlling nature, such as a later decision by another Court of Appeals, as was the case in *Sanitary Refrigerator Co.*, 280 U. S. 30, 34, footnote 1, or such as the intervening repeal of the Eighteenth Amendment and the consequent implied repeal of the National Prohibition Act, as was the case in *Massey* v. *United States*, 291 U.S. 608. No recent decisions are cited, no change has been made in the Bankruptcy Act, no change has been made in the Illinois Chancery Act, and no action has taken place in the bankruptcy proceedings.

Furthermore, counsel for petitioners does not and cannot show that there are other substantial grounds available to petitioners although not previously presented, such as was suggested in *Schriber Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50, namely, that nothwithstanding the doubtful validity of the patents, litigations elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit. The petition for rehearing does not present any substantial grounds although not previously presented It is a mere restatement of arguments already made.

For failure of counsel to comply with Rule 33 and his obvious inability to so comply, we submit that for this reason alone the petition for rehearing should be summarily denied.

II.

In arguing under Point I that "all Illinois trusts, except those made expressly inalienable, would be subject to destruction by the Court of Appeals ruling," petitioners' principal argument (p. 2) is that *spendthrift trusts* should be protected in bankruptcy proceedings. This argument is utterly irrelevant in this case, *because the Joslyn trusts were NOT spendthrift trusts.*

In advancing this argument, petitioners necessarily (and erroneously) contend (p. 2) that beneficial interests in spendthrift trusts are alienable, but that the bankrupt's beneficial interests in the Joslyn trusts are *not* alienable under Illinois law. The exact reverse is the case. A beneficiary's interests in a spendthrift trust are *inalienable*, whereas the bankrupt's interests in the Joslyn trusts are *alienable*, the Illinois (and Federal) cases so holding being cited at length in both the Court of Appeals' opinion (R. 240-1) and in respondent's answering brief in this Court (p. 7, 15). *None of these cases are even referred to in the petition for rehearing.*

The argument (p. 3) that a beneficiary of a transferable interest in a non-spendthrift trust "may hereafter destroy a trust intended for his benefit" by "deliberately incurring debts and thereafter filing a voluntary petition in bankruptcy" is based solely upon the utterly erroneous contention that the bankrupt could not have transferred (voluntarily) his beneficial interests in the Joslyn trusts without going into bankruptcy (voluntarily or involuntarily). But as indicated above, the Court of Appeals correctly held (1) that the bankrupt's interests *were* voluntarily transferable, and then (2) applied correctly Section 70(a)(5) of the Bankruptcy Act whereby *all* transferable interests of the bankrupt are *without exception* vested in the Trustee in Bankruptcy as administrable property.

The argument (p. 3) that a bankrupt could somehow, by a voluntary bankruptcy, procure the *corpus* of a trust under Section 66 of the Bankruptcy Act is without the slightest merit. The Trustee in Bankruptcy never acquires any greater title than the bankrupt has. If, as in this case, the bankrupt has the right to income only, then the Trustee in Bankruptcy acquires the right to income only, and has no right to the *corpus*.

This there is no basis for the conclusion (p. 3-4) that the decision of the Court of Appeals "will nullify the Illinois statute" by "making possible the destruction of a great number of Illinois trusts." That decision wholly respects Illinois trusts, and merely holds that the *transferable interests* of the fraudulent bankrupt shall, under the direct provisions of Section 70(a)(5) of the Bankruptcy Act, be *administrable* in bankruptcy proceedings.

III.

Petitioners argue under Point II that "The Court of Appeals was without authority to substitute its independent interpretation of Illinois property law." But this the Court of Appeal did *not* do. On the contrary, it applied the Illinois law that the bankrupt's interests were transferable, and then correctly interpreted the Federal Bankruptcy Act (Section 70 (a) (5)) in relation thereto.

Petitioners argue that the District Court Judge, who was reversed was once a Justice of the Illinois Supreme Court and in his "order recited unequivocally that 'this question of law is free from doubt.'" No showing is attempted as to why the Court of Appeals should not reverse an erroneous ruling by a District Court judge on a matter of Federal Bankruptcy Law, even though he happened to have formerly been on the state bench.

Under the above mentioned point petitioners persist in their pretense that this is a "diversity" case, and is not based upon their voluntary consent to jurisdiction of the Federal Court under Section 23b of the Bankruptcy Act. It is too clear for honest dispute that petitioners did voluntarily consent to jurisdiction under Section 23b (R. 194-5, 236-7).

IV.

Eaton v. *Boston Trust Co.*, 240 U.S. 427, cited under Point III, was also cited and discussed in petitioners original brief herein, in respondent's brief in opposition, and in petitioners' reply brief. It is inconceivable that it was overlooked. The *Eaton* case involved a trust which the Massachusetts Supreme Court had previously held was a *spendthrift trust*, and this Court's opinion was based on that holding. The opinion of the Court of Appeals (R. 244) distinguishes the *Eaton* case to the satisfaction of any non-partisan mind.

In view of the many elucidations by this Court of the significance of denial of certiorari, the last of which appears to be *Darr* v. *Burford*, 94 L. Ed. (Adv. Sh.) p. 512, decided April 3, 1950, the argument that the denial of certiorari amounts to an overruling of the *Eaton* case is wholly devoid of merit.

V.

Petitioners first urged this Court to grant certiorari by representing that "the judgment of the Court of Appeals was *a final decision* . . ." (Original Petition, p. 4). They still concede that the jurisdictional holding was a final judgment, but in an endeavor to escape the inevitable consequence of the holding that the trust assets are transferable and therefore administrable assets in bankruptcy, they urge this Court under Point IV to make an explanation that certiorari was denied "for want of jurisdiction." But this Court has not denied certiorari "for want of jurisdiction." On the contrary, this Court has "jurisdiction" to grant such writ at any stage of the proceeding. The Judicial Code, §1254(1) provides that certiorari may be granted "before or after rendition of judgment or decree." It is just that this Court will not exercise its jurisdiction in the preliminary stages of a case.

This whole point is obviously a mere effort to prepare for a possible future petition for certiorari, and to pave the way for it in the Court's mind at this time.

It is not compatible with the practice and procedure of this Court that it gives its reasons why it denies certiorari. The most that could be disclosed would be the reasons of particular judges for not favoring the petition for certiorari. Petitioners present no reason, not previously submitted to this Court, why any such explanation should be given to them. Their ulterior motive in making this request is apparent.

In support of an obvious effort to bargain with this Court, petitioners cite *Chicago & Northwestern Ry. Co.* v. *Osborne*, (1892) 146 U.S. 354, 36 L. Ed. 1002, *Wishkah Boom Co.* v. *U. S.*, (1905) 202 U.S. 613, 50 L. Ed. 1171, and *City of Omaha* v. *The Omaha Water Co.*, (1907) 207 U.S. 584, 52 L. Ed. 351. The last two cases are memoranda dismissing *appeals* for want of jurisdiction. No certiorari question is indicated. The *Chicago & Northwestern* case is hardly more than a memorandum decision and is contrary to the more recent rulings of this Court that issuance or denial of a writ of certiorari is discretionary and contrary to the present provision of Sec. 1254(1) of the Judicial Code.

CONCLUSION.

Wherefore, respondent prays that the above mentioned petition for rehearing be denied.

Respectfully submitted,

HORACE A. YOUNG, *Pro Se,*
Attorney for Respondent.

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Respondent.

REPLY OF PETITIONER TO RESPONSE OF RESPONDENT TO PETITION FOR REHEARING.

BENTLY S. HANDWORK,
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Respondent.

REPLY OF PETITIONER TO RESPONSE OF RESPONDENT TO PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The petitioners, by their attorneys, present herewith their Reply to the Response of respondent to their Petition for Rehearing and state as follows:

I.

The Petition for Rehearing heretofore filed herein set forth substantial grounds for granting certiorari not previously presented to this court. Respondent argues that the certificate of counsel attached to the Petition for Re-

hearing did not comply with Rule 33 of this court in this respect, and then attempts to show that the petition did not set forth grounds for granting a rehearing. This argument, in addition to its technical nature, is without foundation.

The certificate of counsel was revised prior to the filing of the Response, and, in addition, the arguments set forth in the Petition for Rehearing are substantial grounds not previously presented.

II.

The general public importance of the questions involved in our petition for certiorari was not previously presented to this court.

Inasmuch as it has been shown that the Court of Appeals decided a question of Illinois law in conflict with the Illinois decisions (Cert. Petn. 11-21) the additional fact that the effect of the erroneous decision will be far reaching is a substantial ground for allowing certiorari not previously presented to this court.

Respondent denies that Illinois spendthrift trusts would be affected by the Court of Appeals' decision (Response 4). He refers this court to decisions cited in his Brief in opposition to our Petition for Certiorari. He neglected, however, to apprise this court of the fact that *Blair* v. *Lynn*, 274 Ill. App. 23, and *Blair* v. *Commissioner* 300 U. S. 5 (being two of the five cases relied upon by him) involved spendthrift trusts containing precise and technical language against creditors and against anticipation by the beneficiaries. This is the situation with respect to innumerable so-called spendthrift trusts. Respondent also neglected to comment upon the fact that under Illinois law all trusts, except those for the benefit of the settlor, are considered "spendthrift trusts." This substantial ground for rehear-

ing, not previously presented to this court, emphasizes that all such Illinois trusts would be subject to destruction or dissipation by the decision of the Court of Appeals.

III.

While in our Petition for Certiorari we relied principally upon the point that the Court of Appeals had disregarded the law of Illinois as set forth in the case of *Hummel* v. *Cardwell*, 390 Ill. 526, cert. den. 327 U. S. 796, we emphasized under point III of our Petition for Rehearing that the Court of Appeals had also rendered a decision in conflict with the prior decision of this court in *Eaton* v. *Boston Trust Co.*, 240 U. S. 427, another substantial ground not previously presented to this court in this connection.

IV.

The final substantial ground not previously presented to this court involved the question of whether or not the two judgments of the Court of Appeals constituted a final decision from which a Petition for Certiorari in this court would lie. Our request to this court (not previously made) to resolve this question, was for the purpose of clarifying future proceedings in this case. The right of this court to deny certiorari "for want of jurisdiction," for the reason that there was no final order upon which certiorari might be based, is authorized by the decisions of this court referred to in our Petition for Rehearing (p. 7.)

Conclusion.

WHEREFORE, petitioners pray that this Court may grant a rehearing and reconsider its order denying certiorari herein, or in the alternative, that the order denying certiorari may be amended to recite that denial of certiorari was for

the reason that the judgment of the Court of Appeals was not final and appealable.

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DAILY, DINES, WHITE & FIEDLER,
122 South Michigan Avenue,
Chicago 3, Illinois,
Of Counsel.

CERTIFICATE.

I HEREBY CERTIFY that I am one of the attorneys for the petitioners in the above entitled cause and that I am a member of the Bar of this Court. I further hereby certify that said Petition for Rehearing and the foregoing Reply are presented in good faith and not for purposes of delay and that the grounds specified for a rehearing are substantial grounds available to petitioners although not previously presented to this Court.

HOMER D. DINES.